90-966

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALLIED DELIVERY SYSTEM, INC.;
ALVAN MOTOR FREIGHT, INC.;
and PARKER MOTOR FREIGHT, INC.,
Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents,

and

HOVER TRUCKING COMPANY OF MICHIGAN,
Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I

QUESTIONS PRESENTED FOR REVIEW

1. May the Interstate Commerce Commission usurp intrastate regulation of motor carriers of property on shipments having both an origin and destination in a single state, in all cases where such shipments move through a breakbulk facility in another state, regardless of the underlying factual circumstances?

2. May the Interstate Commerce Commission, contrary to its past decisions and those of the United States Courts of Appeal and the Supreme Court, ignore evidence of bad faith, in determining a question as to whether an interstate carrier has used its interstate certificate as a subterfuge, to avoid valid state regulation?

3. May the Interstate Commerce Commission relegate the circuity factor, one major portion of its tripartite test, to an insignificant role in determining the proper use of an ICC certificate to conduct less-than-truckload operations in another state.

II

PARTIES

PETITIONERS-APPELLANTS

1) Allied Delivery System, Inc.
2) Alvan Motor Freight, Inc.
3) Parker Motor Freight, Inc.
4) TNT Holland Motor Express, Inc.*
5) State of Michigan*
6) Michigan Public Service Commission*

RESPONDENTS-APPELLEES

1) Interstate Commerce Commission
2) United States of America

RESPONDENT-INTERVENOR

1) Hover Trucking Company of Michigan

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* These parties denoted with an asterisk do not join in this Petition which is filed only on behalf of Allied Delivery System, Inc., Alvan Motor Freight, Inc., and Parker Motor Freight, Inc.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners Allied Delivery System, Inc., Alvan Motor Freight, Inc. and Parker Motor Freight, Inc. respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Interstate Commerce Commission below (Appendix B, *infra*, p. 16a) was unreported.[1] The opinion of the Court of Appeals below (Appendix A, *infra*, p. 1a) denying the consolidated petitions for review of the ICC order is unreported. The opinion of the Court of Appeals below (Appendix C, *infra*, p. 28a) denying Petitioners' Request for Rehearing is unreported.

JURISDICTION

The opinion of the Court of Appeals below (Appendix A, *infra*, p. 1a) was filed on July 26, 1990. Rehearing was sought and denied by order of the Court of Appeals filed September 10, 1990 (Appendix C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal statute involved is 49 U.S.C. § 15021. The applicable statutory provision is set forth verbatim in Appendix D, *infra*, 30a.

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[1] Although officially unreported, the case, *Michigan Public Service Commission* v. *Hover Trucking Company of Michigan*, Docket MC-C-30092 (March 3, 1989) is reported at 1989 Fed. Carr. Cases (CCH) ¶37,668.

STATEMENT OF THE CASE

A. Statement Of The Facts

Respondent-Intervenor Hover Trucking Company of Michigan (Hover) is a for-hire motor carrier, established in 1958. For 25 years, Hover maintained its terminal and headquarters in Niles, Michigan, in the southwestern part of the state, a few miles from the Michigan-Indiana border. Hover conducted operations in Michigan intrastate commerce, pursuant to the terms and conditions of a certificate issued to it by the Michigan Public Service Commission (MPSC), and also conducted interstate operations, pursuant to authority issued to it by the Interstate Commerce Commission (ICC).

Following the liberalization of the entry proceedings at the federal level occasioned by the enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 824 (1980), Hover applied for and received greatly expanded ICC authority by 1982. In 1983, Hover received from the ICC a common carrier certificate authorizing transportation of general commodities between all points in the continental United States. It also received an order expanding its intrastate rights in Michigan, but those rights were still limited geographically.

Simultaneous with the acquisition of its 48 state general commodity ICC authority, Hover, in June of 1983, moved its terminal headquarters from Niles, Michigan to South Bend, Indiana, which sits on the southern edge of the Michigan-Indiana border. Although its prior facilities in Michigan had been limited to the Niles headquarters and a second terminal in Grand Rapids, Hover established numerous additional Michigan terminals in 1983 and 1984, eventually blanketing the lower peninsula. After its move to South Bend, Hover began to solicit Michigan intrastate business for which it did not possess intrastate authority. Hover claimed that by moving the freight across the state line for consolidation at South Bend, the intrastate freight was "transformed" into interstate traffic, which could be handled pursuant to its ICC certificate.

The President of Hover, Mr. Tony VanBokkem, admitted that he had told a newspaper reporter in 1983 that by moving Hover's facilities from Niles, Michigan to South Bend, Indiana, Hover could in fact serve the State of Michigan without holding authority from the MPSC. Hover solicited Michigan-to-Michigan traffic through both direct sales contacts and advertisements. It successfully diverted substantial amounts of freight from Michigan intrastate carriers. Numerous accounts were diverted from Petitioner Allied Delivery System, Inc. (Allied), a carrier which held the required authority from the MPSC.[2] Other major shippers, such as Upjohn Company of Kalamazoo diverted its Michigan "intrastate" pharmaceutical traffic from Petitioner Alvan Motor Freight, Inc. (Alvan) to Hover, as long ago as 1983. Alvan also possesses MPSC authority, as does Petitioner Parker Motor Freight, Inc. (Parker).

The five primary Michigan terminals operated by Hover are capable of and do perform various consolidation and sorting tasks, in Hover's less-than-truckload business. Yet, Hover maintains that all Michigan-to-Michigan freight today is routed through its distant South Bend, Indiana terminal, rather than moving in a direct fashion. Although Hover alleged, in 1986 in response to a complaint proceeding initiated against it by Staff of the MPSC, that all of the Michigan-to-Michigan freight being handled by it was being moved through South Bend, and even submitted a sworn affidavit from Mr. VanBokkem to the Commission asserting such, an investigation by the Michigan State Police Motor Carrier Division revealed that significant volumes of Michigan-to-Michigan shipments were being handled by it without any South Bend routing.

After being apprehended, Hover then admitted the same. Hover had constructed computer records which on their face

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[2] Petitioner Allied failed financially in November of 1989. There is an ongoing Chapter 7 bankruptcy proceeding, involving Allied.

indicated that the traffic moved through the South Bend terminal, when it did not, in reality. Prior to being uncovered by the MPSC and Michigan State Police, Hover employed a stated policy for its Michigan terminals of not routing through South Bend any Michigan-to-Michigan shipments where the origin and destination responsibility was had by a single Hover Michigan terminal. The same directive obtained in situations where Hover decided that the consolidated less-than-truckload shipments moving between any two of its Michigan terminals should be routed direct on a particular day. Truckload shipments were also moved between any two Michigan points, without routing through South Bend.

After the uncovery of its Michigan direct operations, Hover agreed not to transport any freight originating from and destined to the same Hover Michigan terminal, to avoid the temptation to route freight direct. Hover also agreed to move all Michigan-to-Michigan freight through South Bend. However, Hover then established three additional Michigan terminals, which were assigned responsibility for portions of the geographic areas of its existing terminals, thereby easing the pain of conforming with this restriction. Also, following its admission of unlawful activity, Hover continued to handle truckload Michigan-to-Michigan freight, moving that freight through South Bend, despite the fact that it did not require consolidation or sorting.

As examples of the circuity, Hover transported shipments, from Ubly, in the thumb area of Michigan, to Port Huron, also in the thumb area, a distance of only 72 direct miles, over a circuitous route of 495 miles, with an ICC circuity factor of 588%. A shipment from Jackson, Michigan to Charlotte, Michigan, only 36 miles apart, was sent over a winding 236 mile course. A shipment from Detroit to Lapeer, a distance of some 56 miles, was given a scenic tour of 372 miles, with a circuity factor of 564%. A shipment from Warren to Pontiac, Detroit suburbs only 23 miles apart, was sent some 374 miles over the river and through the woods to South Bend and back. Hover had two terminals, at Detroit and

Pontiac in place in the Detroit area, also. (See Appendix E, *infra*, a circuity chart and Appendix F, *infra*, a map).

An economics expert, Mr. Glenn L. Fast, studied the profitability of certain shipments moving in the Hover system. He concluded that the traffic was unprofitable with exceedingly high operating ratios, given the circuitous routing provided the packages and parcels in the Hover trucks. Over the course of a year, Hover transports over 27,500 Michigan-to-Michigan shipments weighing over 40 million pounds in this fashion. It derives over two million dollars in revenue from this transportation activity. It provides service to the entire lower peninsula of Michigan, a large geographic territory, through a distant breakbulk facility in another state.[3] This activity is all conducted pursuant to Hover's ICC certificate, despite the intention of the Michigan shippers, in each and every case, that the freight was intrastate in character, given its known Michigan destination.

B. History of Proceedings and Basis for Federal Juridiction.

On September 10, 1986, the MPSC staff filed a formal complaint with the MPSC, alleging that Hover was conducting Michigan-to-Michigan transportation outside the limits of the authority granted to Hover by the MPSC. Although the MPSC ruled on May 14, 1987 that primary jurisdiction of the question of whether Hover was abusing its ICC certificate resided with the ICC, the state agency ruled further that it possessed jurisdiction to examine allegations concerning shipments made by Hover which did not cross the state line. A hearing was held. Petitioners Allied, Alvan, and Parker, as well as TNT Holland Motor Express, Inc. (TNT) intervened in the proceedings, in support of the MPSC Staff complaint.

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[3] A "breakbulk facility" is a truck terminal used for sorting, consolidation, assembly and distribution functions for less-than-truckload freight. "Less-than-truckload" (LTL) freight consists of smaller shipments (i.e., taking up less than a truckload), generally defined as shipments under 10,000 pounds.

On September 15, 1987, the Commission issued an order approving a stipulation and settlement agreement of the parties concerning the unlawful transportation which Hover admitted that it performed on a routine basis, on Michigan-to-Michigan freight outside the scope of its MPSC authority. This was traffic which Hover had not transported across the state line, but, instead, routed directly.

The MPSC then filed on March 21, 1988, a complaint with the Interstate Commerce Commission, seeking a finding that the operations conducted by Hover through South Bend on Michigan-to-Michigan traffic were not lawfully conducted pursuant to its interstate authority, but were a subterfuge designed to avoid intrastate regulation. Petitioners Allied, Alvan, and Parker, as well as TNT, Central Transport, Inc., and the Regular Common Carrier Conference of the American Trucking Associations, Inc. intervened in support of the MPSC. The ICC ruled in Respondent Hover's favor, however. It found that the transportation conducted by Hover through South Bend was lawful pursuant to its ICC certificate. Then, Petitioner Allied, separately, Petitioners Alvan, Parker and TNT jointly, and the State of Michigan and Michigan Public Service Commission jointly filed separate Petitions for Review with the United States Court of Appeals for the Sixth Circuit.[4] Upon review, the Court of Appeals issued a two-to-one decision, denying the relief requested by Petitioners. Circuit Judge Wellford concurred in part and dissented in part, believing that a remand was required. On September 10, 1990, a joint petition for rehearing, joined in by all of the Petitioners, was denied.

Jurisdiction is with the Court of Appeals to determine the validity of final orders of the Interstate Commerce Commission, pursuant to 28 U.S.C. § 2342(5).

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[4] The Allied petition was docketed as 89-3383, the Alvan, TNT, and Parker petition was docketed as 89-3401, and the State of Michigan and Michigan Public Service Commission petition was docketed as 89-3414. The matters were consolidated for consideration on appeal. This Petition for Certiorari is joined in by Petitioners Allied, Alvan, and Parker, jointly.

REASONS FOR GRANTING THE WRIT

1. Prevent the Usurpation by the ICC of State Jurisdiction Over Intrastate Transportation.

This case, involving as it does a question of the jurisdiction of a federal administrative agency vis-a-vis a state administrative agency, vitally and directly concerns federal-state relations. The jurisdiction of the federal agency over for-hire motor transportation of property is specifically set forth in the Interstate Commerece Act, as amended, at 49 U.S.C. § 10521 (Appendix D, *infra*). The ICC was given jurisdiction of transportation of property between a place in one state and a place in another state. Also, jurisdiction was provided to it of transportation between a state and another place in the same state which takes place through another state. Involved in the Hover case is transportation between one point in Michigan and another point in Michigan, conducted through Indiana.

However, in terms of for-hire motor carriers of property, the Act further provides at 49 U.S.C. 10521(b)(1) that it does not:

> Affect the power of a state to regulate intrastate transportation provided by a motor carrier. . .[5]

It is clear that the power of states to regulate effectively intrastate motor transportation of property as they saw fit was not affected in any respect by the Interstate Commerce Act. The legislative history itself supports the proposition that

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[5] The Act does affect the power of states to regulate intrastate transportation in other respects than for-hire motor carriers of property, however. This is true, for example, of motor carriers of passengers, 49 U.S.C. § 10922(c)(2), 49 U.S.C. § 935, and 49 U.S.C. § 11501(e), rail carriers, 49 U.S.C. § 11501(b), household goods freight forwarders, 49 U.S.C. § 11501(a), and freight forwarders, 49 U.S.C. § 11501(g). Thus, Congress exercised its prerogative to preempt the state regulation of transportation in other respects, but not with regard to for-hire motor carriers of property.

there was never a shred of congressional intent to divest the states of jurisdiction over *bona fide* intrastate transportation of for-hire motor carriers of property.[6]

The federal-state jurisdictional controversy must be seen within the framework of the Motor Carrier Act of 1980, which significantly modified and liberalized the previous federal scheme for the economic regulation of motor carriers of property. Controls on entry were eased in structuring the 1980 changes. Following the 1980 amendments, the ICC construed the congressional charge to it to accomplish deregulation substantively and administratively in a variety of contexts,[7] and thus embarked on a course of sweeping regulatory

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[6] The proviso to former U.S.C. § 316(e) stated that nothing in the Motor Carrier Act of 1935, August 9, 1935, 49 Stat. 558, empowered the Commission to in any manner regulate intrastate transportation for any purpose whatsoever. The legislative history of federal transportation of motor carriers of property, which commenced with the 1935 Act, totally supports the proposition that federal regulation was not to be extended into intrastate commerce. H.R. Rep. No. 1645, 74th Cong. 1st. Sess. p.2. There was a slight alteration in the language of the proviso to former U.S.C. § 316(e), when the Act was recodified without substantive change in 1978, by Pub. L. 95-473, 92 Stat. 1361 (1978). Concerning the proposition that no substantive changes were made at that time, see H.R. Rep. No. 95-1395, 95th Cong. 2nd Sess. Neither did the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 824 (1980), change the power of states to regulate intrastate transportation by motor carriers of property.

[7] Examples of ICC administrative action liberalizing economic regulation after 1980 include *Rules Governing Applications for Operating Authority*, Ex Parte No. 55 (Sub. No. 43), 45 F.R. 45534 (July 3, 1980), *Removal of Restrictions from Authorities of Motor Carriers of Property*, Ex Parte No. MC-142 (Sub. No. 1), 132 MCC 114 (1980), *Acceptable Forms of Request for Operating Authority*, Ex Parte No. 55 (Sub. No. 43 A), 364 ICC 432 (1980), *Elimination of Notification Procedure in the Processing of Emergency Temporary Authority Applications under 49 U.S.C. § 10938*, Ex Parte No. MC-67 (Sub. No.6), 132 MCC 424 (1981); *Owner-Operator Food Transportation*, Ex Parte No. MC-143, 132 MCC 521 (1981); *Interpretation of Commodity Classification - Wood Chips*, Ex Parte No. MC-45 (Sub. No. 1), 132 MCC 676 (1981); *Leasing Rules Modifications*, Ex Parte No. MC-43 (Sub. No. 12), 132 MCC 927 (1982), and *Motor Contract Carriers of Properties — Proposal to Allow Issuance of Permits Authorizing Industry-Wide*

changes. As time progressed, a greater and greater disparity existed between state regulatory controls over motor carriers and federal motor carrier controls. This was true even in states, such as Michigan, which liberalized its Motor Carrier Act in 1982, although not nearly to the same degree as occurred on the federal level in 1980.[8] This has led to increasing jurisdictional conflict, from an ICC convinced that its deregulatory course is in the best interest of the public from not only an interstate view but from an intrastate view.[9] Any decision of the ICC concerning whether or not transportation was properly conducted, pursuant to a carrier's interstate certificate, must be viewed within the context of this ongoing federal-state dispute as to the efficacy of motor carrier regulation.

There is no dispute that primary responsibility for the interpretation of a motor carrier's operations, pursuant to its interstate commerce certificate, is conferred by Congress on the Interstate Commerce Commission, as established in *Service Storage & Transport Co., Inc.* v. *Virginia*, 359 U.S. 171, 173;

Service, Ex Parte MC 165 (Sub. 1), 133 MCC 298 (1983), among others. That the ICC interpretation of its mandate was not always sustained is evidenced by footnote 17, *infra*.

[8] 1982 P.A. 399, MCL 475.1; MSA 22.531, *et seq.*

[9] For example, on May 22, 1989, Chairperson Heather J. Gradison, Interstate Commerce Commission, wrote to the Honorable William Lehman, Chairman, Sub-Committee on Transportation, U.S. House of Representatives, that ". . . since passage of the Motor Carrier Act of 1980, which increased the intensity of competitiveness in the motor carrier industry, interstate rates have decreased dramatically, thereby reducing transportation cost to the shipping public. Conversely, several states have maintained rigid regulatory regimes, enforcing rate floors and restricting competitive entry. Material disparity does now exist between market-driven interstate rates and the intrastate rates elevated through regulation by some of the state public service commissions. Not surprisingly, shippers are increasingly interested in routing their traffic in interstate commerce." Certain ICC Commissioners have suggested that Congress preempt intrastate motor carrier of property regulation. Congress has refused to adopt any such proposals to date.

79 S.Ct. 714, 3 L.Ed.2d 717 (1959). The State of Michigan here recognized that, as well as its right to seek such an interpretation from the ICC, by filing a complaint pursuant to 49 U.S.C. § 11701 against Hover.

Implicit in *Service Storage*, however is the recognition by this Court, as well as the Interstate Commerce Commission, that an ICC certificate should not be employed in a subterfuge fashion to evade valid intrastate regulation. In *Service Storage*, this Court noted, at 359 U.S. 175, that ". . . no direct evidence of bad faith . . ." had been offered against the involved carrier. This Court also emphasized the "*bona fides*" of the carrier's operation. The use of an ICC certificate as a subterfuge is unlawful.

However, the ICC in *Hover* approved Respondent's operations. It did so in a manner which disregarded the ICC's past precedent, as well as rulings of the federal courts and this Court on interpretation of the federal-state jurisdictional question. That is why this petition should be granted. The two judge majority below, which affirmed the ICC's judgment that Hover was properly transporting Michigan-to-Michigan freight pursuant to its ICC certificate, even questioned the ICC's reasoning, on the bad faith issue, as stated below in Appendix A, *infra*, page 8a, that:

> We are given pause by the ICC's assertion in this Court that 'motivation is not relevant here because the criteria set forth in *Arrow*, *supra*, had been met'. As the ICC has noted elsewhere, direct evidence of bad faith is certainly relevant.

Judge Wellford, dissenting, (Appendix A, *infra*, page 9a) noted the following, with regard to the bad faith issue:

> I am at a loss to understand this part of the ICC's conclusions in this controversy. Evidence of bad faith is, indeed, highly relevant to any ultimate determination of subterfuge to circumvent legitimate state regulation.

What the ICC has here done, however, is ignore in large part the past test employed by both it and the federal courts, in determining the *bona fides* of a carrier's operations pursuant to its ICC certificate. The ICC has done so, in a way consistent with expansion of its jurisdiction vis-a-vis the states, contrary to congressional intention. Although such a goal furthers the expressed agenda of certain past ICC Commissioners to eliminate or end in whatever way possible what is considered to be overly rigid intrastate regulation of motor transportation, such an arrogation of jurisdiction is not consistent with the proper role of an administrative agency. Only through issuance of the Writ can this properly be addressed.

2. Avoiding the "Bad Faith" Issue, in Order to Expand ICC Jurisdiction.

What the ICC actually did, in *Hover*, was find that evidence of bad faith was not relevant to its decision concerning the *bona fides* of Hover's ICC operations, as Hover, in the ICC's flawed analysis, had met the test of *Pennsylvania Public Utility Commission* v. *Arrow Carrier Corp.*, 113 MCC 213 (1971). Through this cavalier declaration, the ICC, however, disregarded 50 years of precedent, in both its decisions and those of the federal courts. The ICC did this, once again, to insulate from intrastate economic controls virtually any less-than-truckload operation conducted through a breakbulk facility in another state. The *Hover* decision represents an open invitation by the ICC to carriers wishing to escape intrastate regulation, because of their lack of intrastate authority, to avoid it entirely. This can be accomplished by merely moving a breakbulk facility across a state line so that vast geographic reaches, such as the lower peninsula of Michigan served by Hover through its distant South Bend, Indiana breakbulk in this case, can be served without the need for constrictive (in the ICC's view) intrastate economic regulation. The ICC does not have the power to ignore the "bad faith" language in numerous past

cases, in order to expand its jurisdiction without authority from Congress.

As long ago as the case of *Eichholz* v. *Public Service Commission of Missouri*, 306 U.S. 268, 83 L.Ed. 641, 59 S.Ct. 533 (1939), aff'g sub. nom.; *Eichholz* v. *Hergus*, 23 F.Supp. 587 (W.D.Mo., 1938), this Court recognized the notion that hauling merchandise across a state line to avoid intrastate regulation would not be condoned. In approving the propriety of punitive action taken by the state against a subject carrier which had moved shipments from St. Louis to Kansas City, Missouri, through a terminal in Kansas City, Kansas, this Court stated, at 306 U.S. 274 that:

> If Appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the state's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transaction, in the application of the Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantful intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint.

The Court concluded that said operations were not made in good faith, but were actually a subterfuge to evade valid Missouri jurisdiction.

The ICC itself applied this "bad faith" test over the years. For example, in *Pennsylvania Public Utility Commission* v. *Hudson Transportation Co.*, 83 MCC 729 (1960),[10] the Com-

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[10] The decision of the ICC was affirmed on reconsideration, at 88 MCC 745 (1962). The Commission affirmed, finding that the two carriers involved ". . . have attempted in bad faith to convert what is essentially intrastate commerce into interstate commerce and thus to defeat the regulatory laws and policies of the Commonwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple." 88 MCC at 748.

mission was confronted with the issue of whether the transportation by two carriers between points in Pennsylvania, by transporting those shipments across the New Jersey state line, was *bona fide*. The Commission concluded that it was not. The Commission emphasized that transportation performed through points in other states must not be conducted in bad faith to escape proper intrastate jurisdiction, at 88 MCC 739. It was there declared by the Commission:

> Circuitous routing, between points in a state through another state, in and of itself, is not conclusive evidence of a 'bad faith' interstate operation. *But other factors may exist which, when coupled with circuity, warrant a different conclusion.* (Emphasis supplied) 83 MCC at 739-740.

The existence of bad faith was a vital part of the Commission's determination there. The ICC examined the "bad faith" issue in various other proceedings, in finding that carriers had performed transportation not authorized by the terms and conditions of the ICC certificates, between two points in the same state. Bad faith was relied on by the Commission in declaring similar operations invalid, in *Service Trucking Company, Inc. Petition for Declaratory Order*, 94 MCC 222, 225-226 (1963),[11] *Pennsylvania Public Utility*

On appeal to a three judge district court, in *Hudson Transportation Co.* v. *United States*, 219 F.Supp. 43 (D.N.J., 1963), aff'd *sub. nom. Arrow Carrier Corp.* v. *United States*, 375 U.S. 452; 84 S.Ct. 524; 11 L.Ed.2d 477 (1964), the decision was upheld. The reviewing court examined the evidence of bad faith at 219 F.Supp. 47. The court concluded, at 219 F.Supp. 49, "the record makes it very clear that we are here dealing not with *bona fide* transportation in interstate commerce but with a mystic maze route which is a more or less shrewd expedient designed solely to escape the control of the Pennsylvania Commission. In the full sense of the word, the operations are subterfuges."

[11] This decision was affirmed *sub. nom.* in *Service Trucking Co.* v. *United States*, 239 F.Supp. 519 (D.Md., 1965); aff'd 382 U.S. 43, 86 S.Ct. 183; 15 L.Ed.2d 36 (1965).

Commission v. *Leonard Express*, 107 MCC 451, 459-463 (1968),[12] and *Haley, Public Utility Commissioner of Oregon* v. *City Transfer and Storage Co.*, 112 MCC 80, 92-94 (1970).

Similarly, the three judge district courts also looked to a carrier's purpose and motivation, in reviewing these ICC decisions. For example, in *Service*, *supra*, at 239 F.Supp. 521, the court stated:

> From the findings of fact, the conclusion is inescapable that Service's *only purpose* in routing less-than-truckload shipments via Bridgeville, Delaware is to attempt to make legal, by converting into interstate shipments, shipments in intrastate commerce for which Service lacks authority from the Public Service Commission of Maryland. (Emphasis supplied).

In *Leonard*, the reviewing three judge district court pointed out, at 298 F.Supp. 560, n.10 that the carriers involved had admitted that the routes were chosen for purposes of creating interstate passage.

Even in cases where the ICC found that the operations of a carrier were lawfully in interstate commerce, emphasis was placed on the lack of information which pointed to subterfuge. Evidence of motivation and past practice was strongly considered. Not only was this true in *Service Storage*, *supra*, by the ICC,[13] as well as by this Court, but it was similarly considered in numerous other cases, including *Rock Island Motor Transit Company* v. *Watson-Wilson Transportation System, Inc.*, 99 MCC 303 (1965).[14] In *Rock Island*, at 99 MCC 316, the Commission noted:

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[12] This decision was affirmed *sub. nom.* in *Leonard Express, Inc.* v. *United States*, 298 F.Supp. 556 (W.D.PA., 1969).

[13] See 71 MCC at 306.

[14] This decision was affirmed sub. nom. in *Rock Island Motor Transit Company* v. *United States*, 256 F.Supp. 812 (S.D.Ia., 1966).

> Nor does any other evidence point to a subterfuge. Indeed, it points the other way. As narrowly as we can tell from this record, the operation was begun innocently more than a generation ago, with no subterfuge intended on Watson's part and none feared by petitioners or by intervenor.

The operation was neither begun as a subterfuge nor operated as one, the Commission concluded, and was accordingly lawful. Similarly, in *Missouri Public Service Commission* v. *Missouri-Arkansas Transportation Company*, 103 MCC 641, 646 (1967), the Commission refused to find a carrier's operations to be improper:

> . . . absent evidence from which we can independently infer bad faith on defendant's part . . .

Operational reasonableness prevailed, the Commission emphasized, *if there was no evidence of bad faith.* There was no implication whatsoever that bad faith evidence was not to be considered.

Three judge district courts, similarly, when sanctioning operations conducted by a carrier between points in the same state through another state, pursuant to an ICC certificate, have emphasized the lack of evidence of bad faith. There has never been an indication that bad faith evidence was not to be considered, in making a determination as to the validity of an operation.[15] The only conclusion that can be drawn from a

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[15] In *Rock Island*, *supra*, the three judge district court, on review, noted the Commission's finding that there had been no other evidence of subterfuge, at 256 F.Supp. 816. In *Tri-D Truckline, Inc.* v. *ICC*, 303 F.Supp. 631 (D.Ks., 1969), reversing *Missouri Public Service Commission* v. *Tri-D Truckline, Inc.*, 107 MCC 684 (1968), the court, in addition to criticizing the sparsity of the record, noted that ". . . there were no culpable admissions by Plaintiff's officers or employees . . .", 303 F.Supp. at 635. In *Jones Motor Co.* v. *United States*, 218 F.Supp. 133 (E.D.Pa., 1963) petition for reh. den., 223 F.Supp 835, aff'd *sub. nom.*, *Highway Express Lines* v. *Jones Motor Co.*, 377 U.S. 217, 84 S.Ct. 1224, 12 L.Ed.2d 292 (1964), reversing

review of both the ICC and appellate decisions concerning this issue is that bad faith is vital and relevant to the Commission's ultimate determination as to the validity of operations pursuant to an ICC certificate. Here, the Commission perfunctorily rejected such evidence, based on the mistaken notion that any economic justification obviates the need to consider evidence on bad faith. The Commission rejected years of decisional analysis in so ruling. It is little wonder that even the majority below was troubled by the Commission's statement on this issue. A review of the evidence in this case reveals numerous factors which indicate the presence of bad faith, on the part of Hover. These include:

1) The movement in 1983 of Hover's base of operations from its historical home in Niles, Michigan to South Bend, Indiana — across the state line;

2) The admission in 1983 by Hover's president to a newspaper reporter that Hover's move would allow Hover to perform Michigan intrastate operations without the need for possessing authority from the MPSC;

3) The commencement of service between points in Michigan for which Hover possessed no intrastate authority contemporaneous with the move to Indiana;

4) The aggressive and active marketing of its Michigan-to-Michigan service from 1983 on;

5) Prior to its apprehension by the Michigan State Police, the routing of truckload shipments direct between points in Michigan, without traversing the state line;

6) Prior to its apprehension by the Michigan State Police, the handling of less-than-truckload traffic in

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Pennsylvania Public Utility Commission v. *Jones Motor Co.*, 89 MCC 605 (1962), the reviewing court examined the evidence of subterfuge and found it to be insufficient, at 218 F.Supp., 137.

normal routine operations between Michigan points without traversing the Michigan state line, whenever it was determined that volumes were sufficient;

7) Prior to its apprehension by the Michigan State Police, the handling of Michigan-to-Michigan less-than-truckload traffic without traversing the Michigan state line, whenever the pick-up responsibility and delivery responsibility for a shipment involved the same Hover terminal;

8) The non-use by Hover of Michigan terminals which it has in place capable of handling assembly, sorting, and consolidation functions for less-than-truckload traffic;

9) The submission by Hover's president of a false affidavit to the MPSC, alleging that all of Hover's operations were being conducted across the state line;

10) The creation by Hover of computer documents, which indicated that all freight was being routed through South Bend, even though much of that freight never moved in that fashion;

11) The placement of additional terminals in Michigan following its 1987 stipulation and agreement not to handle freight where the same pick up and delivery terminal had responsibility, so that, by assigning each terminal a smaller geographic area of responsibility, the effects of the agreement could be avoided.

12) The routing of shipments only a few miles apart, i.e., between Detroit and one of its suburbs, through South Bend, Indiana, involving a circuity factor of over 1,000%.

13) The scope and nature of the illegal activity, where literally tens of thousands of shipments were handled over the course of a year.

14) The continued handling of truckload shipments (i.e., over 10,000 pounds) through South Bend, when such shipments do not require sorting, consolidation, etc., in any respect.

This record is complete. Several days of evidentiary hearings were had before the Michigan Public Service Commission involving these operations, which evidentiary record was submitted to the ICC. Also, verified statements were submitted to the ICC from state officials, investigatory officers from the Michigan State Police, and the motor carriers themselves, regarding Hover's operations, as well as from an economic expert. Former Hover agents testified in the evidentiary hearing as to past Hover practices of routing freight direct. The past practices did not even cease when the MPSC instituted a formal complaint proceeding against Hover, in response to which Hover's president initially submitted an untrue affidavit to the MPSC, denying that such activities were occurring. It was only when confronted with direct evidence that its illegal operations had been discovered that it agreed to cease moving shipments direct.

The ICC had never before been faced with a record showing circuity, in the case of individual shipments, of over 1,000%, or of transportation of the geographic nature and extent sanctioned here. To dismiss the bad faith evidence in this case, as the ICC did because of its findings with regard to operational justification, is an abuse of discretion, which should not be countenanced.[16] The Commission's discretion is not boundless. When it has acted in the fashion in which it did here, in a jurisidictional power grab from the states, the action should not be approved.

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[16] In another recent review of ICC action involving a similar issue, *Gray Lines Tour Company of Southern Nevada* v. *ICC*, 824 F.2d 811, 814 (9th Cir., 1987), the court noted that ". . . routing through another state will be treated as intrastate transportation if the carrier routes the traffic out-of-state as a subterfuge to avoid state regulation". The law on this point has not changed, even in the case of passenger transportation which is still in the

3. The Impropriety of Writing the Circuity Factor Out of the *Arrow* Test.

The ICC has, for the last several years, relied on its test in *Arrow*, *supra*, in determining whether a carrier's operations are *bona fide*. The *Arrow* test looks at the reasonableness of a carrier's operations, including:

> (1) The degree of circuity involved in the interstate route when compared with the 'local' route normally employed by intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority and desire to transport otherwise unavailable traffic, and (3) the incidental or dominant character of the intrastate traffic as a portion of the carrier's overall operation. *No single factor is controlling. Nor is there any presumption in favor or against any one.* (Emphasis supplied) 113 MCC at 220.

The Commission in this case, for the first time, declared that circuity does not play a major role in evaluating less-than-truckload operations across the state line pursuant to an ICC certificate. It further noted that the degree of circuity was well within that approved in *Jones Motor*, *supra*, while failing to consider that much lesser degrees of circuity had been disapproved in cases such as *Service Trucking*, *supra*. It is apparent that the ICC arrived at a result — expansion of its jurisdiction — and then strained and stretched to reach that conclusion through this misapplication of prior case law. LTL operations were involved in *Leonard Express*, *supra; Service Trucking*, *supra;* and *Haley*, *supra*, all found to be illegitimate ICC activities.

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domain of the states. Even the ICC felt constrained, after the Petitions for Review had been filed by Petitioners below, to declare a portion of a carrier's alleged ICC operations to be invalid in *Pittsburgh—Johnstown—Altoona Express, Inc., Petition for Declaratory Order*, Docket No. MC-C-30129 (February 6, 1990), 1990 Fed. Carr. Cases ¶37,795 (PJAX).

The ICC, moreover, managed to reach a conclusion that the Hover circuity factor was only 24.2%, by focusing on traffic which is not at issue in this proceeding, i.e., that traffic which does not have both a Michigan origin and Michigan destination, and is handled by Hover. This method of calculation makes a mockery of the circuity test. Determining the circuity of a shipment from Indianapolis, Indiana to Lansing, Michigan, in order to reduce the circuity factor of Hover, on shipments, for example, from Detroit to Port Huron, is irrational, illogical, and ultimately irrelevant to the issues in this case. Similarly, in its determination of the circuity factor, the ICC should have taken into account the area which Hover serves through South Bend — the entire lower peninsula of Michigan. This is not a local operation from one point in Pennsylvania to another point in Pennsylvania through New Jersey, for example.

There is a broad Hover operation between virtually any two points in Michigan, with degrees of circuity above 500 and even above 1,000 percent. The ICC had never examined circuity of this degree before. Perhaps because of this, it ruled that circuity did not play a major role.[17] This is an abuse of discretion. Hover, indeed, had recognized and admitted the inefficiency of its operations through South Bend, by routing "in its normal routine operations during 1986" shipments direct, without crossing a state line, prior to being apprehended.[18] The circuity factor was not properly analyzed

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[17] That circuity still apparently plays some role in the *Arrow* test can be found in the *PJAX* decision, *supra*, at p.10, where linehaul operations between Pittsburgh and Harrisburg, Pennsylvania, by way of Baltimore, Maryland, were found to be unduly circuitous. Why it made a difference in that case, and did not make a difference in this case, even in the case of truckload shipments, it is no more clear than any other part of the ICC's analysis on circuity in Hover.

[18] This quotation is from the Stipulation and Settlement Agreement of the parties, executed by Hover, *In the Matter of Hover Trucking Company*, File No. T-989 (September 15, 1987), before the MPSC. The shipments handled by Hover in this fashion directly, prior to its being apprehended,

by the ICC. When de-emphasizing the circuity test, and calculating circuity in a new way, the Commission was required to state the rationale for departing from its past decisional authority. It did not do so here. As Judge Wellford indicated in dissent, the matter should be remanded also to the Interstate Commerce Commission, with regard to the role to be played by circuity, in a case of this type, and further, with regard to the manner in which circuity is to be determined. The ICC should not be allowed to reformulate a test, in order to allow it to reach a preordained result.

This Court has recognized in the past that there are limits on the administrative expertise of the ICC. In *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, 82 S.Ct. 204; 7 L.Ed.2d 147 (1961), in reversing a decision by the Commission, it was noted:

> Had the Commission, having drawn out and crystallized these competing interests, attempted to judge them with as much delicacy as the prospective nature of the inquiry permits, we should have been cautious about disturbing its conclusion.
>
> But while such a determination is primarily the responsibility of the Commission, we are here under no compulsion to accept its reading where, as here, we are convinced that it has loaded one of its scales. 368 U.S. at 89-90.

The scales were also loaded here in not considering the evidence of bad faith, and in applying a new circuity test, and providing that it was insignificant in any event.

As was noted by this Court further in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 83 S.Ct. 239, 9

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were more than just "a few," as referenced in the majority decision on appeal below. The movements were frequent in number, as well as admittedly normal and routine, contrary to the majority's conclusion below.

L.Ed.2d 207 (1962), in setting aside a Commission order and remanding it for further consideration,

> There are no findings and analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice . . . expert discretion is the lifeblood of administrative process but 'unless we make the requirements for administrative actions strict and demanding, *expertise*, the strength of modern government, then can become a monster which rules with no practical limits on its discretion . . .' (Emphasis in original) 371 U.S. at 167-168.

By ignoring the important evidence of bad faith and concluding as it did that Hover's operations were properly conducted pursuant to its ICC certificate, the ICC did not properly exercise its expert discretion. Actions of this type by an administrative body should not be tolerated.

Of course, earlier this year, this Court rejected the Interstate Commerce Commission's "negotiated rates" policy, in *Maislin Industries, U.S.* v. *Primary Steel, Inc.*, ____ U.S. ____, 110 S.Ct. 2759, ____ L.Ed.2d ____ (1990). In *Maislin*, the Court noted that the Commission does not have the power to adopt a policy that directly conflicts with its governing statute. The Court stated, at 110 S.Ct. 2770, that:

> Generalized congressional exhortations to 'increase competition' cannot provide the ICC authority to alter the well established statutory filed rate requirements.

If that is true with regard to tariff filing requirements, it is certainly true with regard to jurisdiction of the ICC, as opposed to the states, over intrastate transportation. The congressional intent to deregulate was, as Justice Scalia noted, concurring,

> an intent to deregulate *within the framework of the existing statutory scheme.* (Emphasis in original) 110 S.Ct. at 2772.

Congress has not evidenced an intent to deregulate intrastate motor transportation of property, as it has in other areas. That the ICC thinks that this would be the proper course, is no excuse for the ICC to expand its jurisdiction beyond congressional intention, and virtually invite carriers, as it has done in *Hover*, to establish breakbulk terminals across the border from populous regions in other states and to commence service with abandon, giving no regard to intrastate regulation of freight within a state's borders. Congress did not authorize this Commission to expand its jurisdiction concerning intrastate motor carriers of property. In this case there was not even an intent to deregulate the involved transportation expressed by Congress.[19]

CONCLUSION

This case involves an important issue of state-federal relations. As the ICC noted on reconsideration in *Hudson*, *supra* at 88 MCC 748,

> It is true, of course, that this Commission has no jurisdiction over intrastate commerce.

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[19] That the ICC has frequently misconstrued the intent of Congress, in its interpretation of motor carrier regulation since 1980 can be seen by review of *American Trucking Associations, Inc.* v. *ICC*, 770 F.2d 535 (5th Cir., 1985); *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir., 1981), clarified, 666 F.2d 167 (1982), mandate enforced 669 F.2d 957 (1982), cert. den. 460 U.S. 1022, 103 S.Ct. 1272, 75 L.Ed.2d 493 (1983); *Ritter Transportation* v. *ICC*, 684 F.2d 86 (D.C. Cir., 1982), cert. den. 460 U.S. 1022, 103 S.Ct. 1272, 75 L.Ed.2d 494 (1983); *Port Norris Express Co., Inc.* v. *ICC*, 729 F.2d 204 (3rd Cir., 1984); *Erickson Transport Corp.* v. *ICC*, 737 F.2d 775 (8th Cir., 1984); *Port Norris Express Co., Inc.* v. *ICC*, 751 F.2d 1280 (D.C.Cir., 1985); *Regular Common Carrier Conference* v. *ICC*, 820 F.2d 1323 (D.C.Cir., 1987); *Containerfreight Corp.* v. *U.S.*, 752 F.2d 419 (9th Cir., 1985); and *Aero Mayflower Transit Company, Inc.* v. *ICC*, 699 F.2d 938 (7th Cir., 1983), among others.

It was further noted by Commissioner Webb, in that decision, that:

> . . . cooperation between the federal government and the several states is woven by necessary implication into the fabric of the Motor Carrier Act and is expressly required by the National Transportation Policy. 88 MCC at 750.

The Commission, in *Hover*, seems to have lost sight of that fact. Congress did not give authority to this Commission to expand its jurisdiction over intrastate motor transportation of property. Twisting the logic of past decisions to accomplish this result, as the Commission has in this case, is improper. The cloning of Hover occurs on a daily basis in Michigan, as carriers, in reliance on that ICC decision, handle Michigan-to-Michigan traffic through faraway terminals in Toledo, Ohio or Angola, Indiana, or South Bend, Indiana. Freight is diverted away from carriers like Petitioners Alvan and Parker (and formerly from Petitioner Allied), which hold proper intrastate authority. *Hover* represents a serious threat to continued state jurisdiction over their own intrastate transportation. For the reasons expressed, it is respectfully prayed that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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By _____

Date:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 89-3383/3401/3414

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific stipulations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominantly* displayed if this decision is reproduced.

ALLIED DELIVERY SYSTEM, INC.;

(89-3383)

ALVAN MOTOR FREIGHT, INC.;
TNT HOLLAND MOTOR EXPRESS, INC;
and PARKER MOTOR FREIGHT, INC.,

(89-3401)

and

STATE OF MICHIGAN; and
MICHIGAN PUBLIC SERVICE COMMISSION,

(89-3414)

Petitioners-Appellants,

vs.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,

Respondents

HOVER TRUCKING COMPANY OF MICHIGAN,

Respondent-Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION
(Decided and Filed July 26, 1990)

Before: **WELLFORD** and **NELSON**, Circuit Judges, and **EDWARDS**, Senior Circuit Judge.

PER CURIAM. The petitioners, several intrastate Michigan trucking companies and the state agency regulating such carriers, seek review of an Interstate Commerce Commission decision holding that because certain Michigan-to-Michigan traffic of respondent Hover Trucking Company is routed through a terminal in Indiana, the traffic is interstate transportation subject to regulation only by the ICC. Finding no abuse of discretion or want of substantial evidence to support the ICC's decision, we shall deny the petitions for review.

I

For 25 years, Hover Trucking Company of Michigan had its headquarters and only terminal in Niles, Michigan, near the Indiana border. Operating under regulatory authorization from the Michigan Public Service Commission ("PSC"), Hover functioned mainly as a local connecting line for interstate carriers in southwest Michigan and northern Indiana.

Hover began to expand its operations in 1979, after coming under new ownership, and it received expanded authorizations from the PSC and the ICC. In 1982 Hover established a terminal in Grand Rapids, Michigan. Again it received the requisite expanded authorization from the PSC.

Hover acquired a 48-state authorization from the ICC in 1983, at which time the company moved its headquarters to a larger facility in South Bend, Indiana. Hover's president told a newspaper reporter that the move to South Bend would enable the company to serve Michigan customers without obtaining authority from the PSC. Hover subsequently moved into an even larger terminal in South Bend and added additional "satellite" terminals in Michigan.

Hover now operates 25 terminals in Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan. The South Bend terminal serves as a break-bulk terminal, or "hub." Freight is collected and consolidated at Hover's "satellite" terminals, shipped to the South Bend terminal for sorting, and then shipped to a satellite terminal near its destination. Under this system some shipments from one point in Michigan to another point in Michigan are routed through South Bend.

Concerned that Hover was soliciting intrastate shipments in Michigan for which it had no authority, the PSC investigated Hover in 1987. The president of Hover claimed that only shipments made under PSC authority went directly between points in Michigan without passing through the Indiana terminal. However, evidence revealed that this was not invariably the case, and some shipments that purportedly went through the South Bend terminal actually never left Michigan. Hover stipulated that such shipments occurred during 1986 without PSC intrastate authorization, and the company agreed to cease those activities. There is no evidence that such shipments continued thereafter.

Nevertheless, believing that Hover's shipments through South Bend were merely a subterfuge to avoid state regulation, the PSC filed a complaint against Hover with the ICC, seeking to stop Hover's service between points in Michigan even if routed through Indiana. The complaint alleged that Hover routed its Michigan-to-Michigan shipments through South Bend in bad faith, that Hover did not have a legitimate business purpose for routing such shipments through South Bend, that the routings were unnecessarily circuitous, and that the "intrastate" traffic routed through South Bend was not incidental to Hover's interstate operations. Petitioners Allied Delivery Systems, Inc., Alvan Motor Freight, Inc., TNT Holland Motors Express, Inc., and Parker Motor Freight, Inc., all of which claimed to have lost intrastate business to Hover, joined the challenge to Hover's operations.

The ICC found that Hover's shipments from points in Michigan through South Bend to other points in Michigan represented interstate commerce not subject to PSC regula-

tion. In determining that Hover's operations were not a "subterfuge" to avoid intrastate regulation, the Commission found that: (1) the interstate routing of Hover's shipments was not unduly circuitous when compared with the routes of intrastate carriers; (2) there was economic justification for such routing apart from Hover's lack of intrastate authority; and (3) the traffic that would otherwise be intrastate was a small portion of Hover's overall operations.

II

Congress gave the ICC jurisdiction over interstate transportation, 49 U.S.C. § 10521(a), but forbade it in most cases to regulate intrastate transportation. 49 U.S.C. § 10521(b). Congress also expressed a desire that the ICC cooperate with the states in regulating transportation. 49 U.S.C. § 10101(a)(5).

The statute defines neither "interstate" nor "intrastate" commerce. See 49 U.S.C. § 10102. The pre-1978 version of the Interstate Commerce Act, however, defined "interstate commerce" as "commerce between any place in a state and any place in another state or between places in the same state through another state." 49 U.S.C. § 303(a)(10) (repealed). Congress deleted this definition when it revised the Act in 1978, but incorporated identical language in the section delineating the ICC's jurisdiction:

> "[T]he Interstate Commerce Commission has jurisdiction over transportation by motor carrier . . .
>
> (1) between a place in —
>
> (A) a state and a place in another state;
>
> (B) *a state and another place in the same state through another state*; . . . ."

49 U.S.C. § 10521(a) (emphasis added). See also H.R.Rep. No. 1395, 95th Cong., 2d Sess. 219 (1978) (Master Disposition Table showing that § 303(a)(10) was incorporated into § 10521), *reprinted in* 1978 U.S. Code Cong. & Admin. News

3009, 3228, and *table reprinted in* 49 U.S.C.A. Suppl. 816, 821 (1990); H.R. Rep. No. 1395 at 247 (table of Laws Omitted and Repealed indicating that the definition of "interstate operation" contained in § 303(a)(20) was deleted as "unnecessary" because "[t]he chapter on jurisdiction [§§ 10521 *et. seq.*] specifies what is meant by interstate commerce"), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3009, 3256, and *table reprinted in* 49 U.S.C.A. Suppl. 848, 849 (1990). The PSC has presented neither caselaw nor statutory support for the proposition that the statute permits the ICC to regulate the transportation described in § 10521(a)(1)(B) only so long as it does not interfere with a state's regulation of intrastate transportation. The ICC was well within its jurisdiction.

III

The decision of the Commission should not be set aside by this court unless it is unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A) and (E). As this court has explained:

> "If the agency considers the relevant factors and articulates a rational connection between the facts found and the choice made, the decision is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and will be upheld if supported by substantial evidence." *Film Transit, Inc.* v. *ICC*, 699 F.2d 298, 300 (6th Cir. 1983), citing *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

As discussed above, it is clear that transportation beginning and ending in the same state but passing through another is interstate commerce. It is equally clear, however, that a carrier may not in "bad faith" use interstate routings as a "subterfuge" to avoid state regulation. *Pennsylvania Public Utility Com'n* v. *Arrow Carrier Corp.*, 113 M.C.C. 213, 219 (1971) ("*Arrow*"), *aff'd sub nom. Pennsylvania Public Utility*

Com'n v. *United States*, 1973 Fed. Carr. Cas. (CCH) ¶ 56206 (M.D.Pa. 1973), *aff'd per curiam*, 415 U.S. 902 (1974). *Accord, Gray Lines Tour Co. of Southern Nevada* v. *ICC*, 824 F.2d 811, 814 (9th Cir. 1987).

The petitioners in the case at bar charge that Hover uses its South Bend terminal in bad faith to avoid state regulation of Michigan-to-Michigan freight, thereby allowing it to offer lower rates than those established by the PSC for intrastate transportation. The complainant has the burden of proof on such an issue, of course. *Missouri Public Service Com'n* v. *Missouri Arkansas Transp. Co.*, 103 M.C.C. 641, 649 (1967).

As the Commission has observed, "[f]ixing the line between a legitimate interstate operation and a bad faith scheme to avoid state regulation has always been a difficult task." *Arrow*, 113 M.C.C. at 221. The efficiency of an operation is not controlling, but it does shed light on a carrier's *bona fides*. *Service Storage and Transfer Company, Inc.* v. *Virginia*, 359 U.S. 171, 176 (1959). Recognizing this, the Commission will usually test good faith by examining the efficiency or reasonableness of the carrier's actions:

> "The Commission and the courts, in most of the cases involving an alleged subterfuge, will compare the efficiency of the direct and the circuitous routes. Such a comparison is not the sole test of good faith. *Service Storage and Transfer Company, Inc.* v. *Virginia*, [359 U.S. 171, 176 (1959)]. However, it is usually the best indicator of the carrier's intent because without some compelling reason, a carrier would normally seek and use the most efficient routes available." *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp. System, Inc.*, 99 M.C.C. 303, 307 (1965), *aff'd sub nom. Rock Island Motor Transmit Co.* v. *United States*, 256 F.Supp. 812 (S.D. Iowa 1966).

Here the Commission considered each of three factors identified in *Arrow* as relevant: (1) the degree of "circuity" involved in the questioned route when compared with the local

route normally employed by intrastate carriers; (2) the economic or operational justification for such routing; and (3) the proportion of the carrier's overall operation accounted for by the questioned traffic. *Arrow*, 113 M.C.C. at 220.

There is substantial evidence to support the ICC's conclusion that Hover's operation passes muster under *Arrow*. "No single factor is controlling," *id.*, but it is logical that the importance of the circuity factor should vary in inverse proportion to the strength of the economic or operational justification for the routing.

Spoke-and-hub traffic patterns often improve efficiency by decreasing unused capacity. Overnight couriers and airlines provide the best-known examples, but the ICC has long recognized that the use of such patterns may promote the efficient movement of less-than-truckload-lot shipments of freight. *See Rock Island*, 99 M.C.C. at 306; *Missouri Public Service Com'n* v. *Missouri-Arkansas Transp. Co.*, 103 M.C.C. 641, 647 (1967); *Maudlin* v. *Southwest Delivery Co.*, No. MC-C-10930, 1985 Fed. Carr. Cas. (CCH) ¶37,198 (Nov. 15, 1985), *aff'd without op.*, 835 F.2d 1435 (9th Cir. 1987).

Of course, "the mere assertion that operating efficiencies flow from a circuitous operation is not enough." *Rock Island*, 99 M.C.C. at 307. The ICC looked closely at the economic and operational advantages of Hover's spoke-and-hub system, and found that the nightly volume of intrastate shipments between any two of Hover's Michigan terminals would be only 1,000 to 7,500 pounds. This would not be enough to support nightly direct runs. The average trailer load into or out of South Bend, in contrast, was 22,000 pounds. Hover's spoke-and-hub traffic patterns enabled the company to use its trucks more efficiently, and as the ICC noted, they allowed Hover to provide overnight service between points in Michigan that would not otherwise receive it. *See Service Storage*, 359 U.S. at 176 ("the creation of this flow of traffic [less-than-truckload-lot shipments to and from a hub] is a timesaver to the shipper since there is less time lost waiting for the making up of a full truck load"). Although Hover

might have been able to route a few of these Michigan-to-Michigan shipments directly (as it had in 1986 until caught by the PSC), we have no basis for rejecting the Commission's conclusion that the spoke-and-hub system was more efficient overall.

The petitioners also argue that, the *Arrow* test aside, the ICC erred in failing to consider the direct evidence of bad faith. Many of the cases relied on by the ICC did not involve such direct evidence. *See Service Storage*, 359 U.S. at 175; *Rock Island*, 99 M.C.C. at 312; *Jones Motor Company* v. *United States*, 218 F.Supp. 133, 137 (E.D.Penn. 1963), *petition for reconsideration denied*, 223 F.Supp. 835 (E.D. Penn. 1963), *aff'd sub nom. Highway Express Lines, Inc.* v. *Jones Motor Co., Inc.*, 377 U.S. 217 (1964) (per curiam); *Missouri Public Service Commission*, 103 M.C.C. at 648.

We are given pause by the ICC's assertion in this court that "motivation is not relevant here because the criteria set forth in *Arrow*, *supra*, have been met." As the ICC has noted elsewhere, direct evidence of bad faith is certainly relevant. See *Rock Island*, 99 M.C.C. at 307 (efficiency "is not sole test of good faith" but is an "indicator of the carrier's intent"). And "where the matter of comparative efficiency presents a reasonably close question, the issue of lawfulness should not be determined on that basis alone." *Rock Island*, 99 M.C.C. at 316 (citing *Service Storage*, 359 U.S. at 176); *Thurston Motor Lines, Inc.*, 104 M.C.C. 1, 15 (1967).

The ICC's decision makes it clear that the Commission did consider the relevant evidence. Its discussion of the "direct evidence" that was offered to show subterfuge or bad faith probably leaves something to be desired, but it was within the Commission's province to find, as it did, that the fact that Hover had admittedly engaged in illegalities was not dispositive. It was likewise within the Commission's province to find, as it did, that the statement Hover's Mr. Van Bokkem gave a newspaper reporter about the regulatory consequences of Hover's move to South Bend would not support the conclusion that the move was made solely to bring those consequences about. Where the move is adequately justified on

economic grounds, we cannot say the ICC was required to find bad faith because Hover recognized the regulatory consequences as well. Nor can we say the Commission was wrong in giving the apparent efficiency of Hover's operations more weight than the direct evidence of bad faith. Substantial evidence supports the Commission's conclusion, regardless of the accuracy of its subsequent dictum on the irrelevance of motivation.

The petitions for review are DENIED.

WELLFORD, Circuit Judge, **concurring in part and dissenting in part.**

I concur in the majority's conclusion concerning jurisdiction (Part II) but would augment the discussion by adding the following:

In *Rock Island Motor Transit Co.* v. *Watson Wilson Transportation*, 99 MCC 303, 306 (1965), *aff'd*, 256 F.Supp. 812 (S.D. Iowa 1966),[1] the Commission stated:

> Since the Supreme Court's decision in *Service Storage and Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959), it has been settled that the Commission's competence to interpret its own certificates extends to matters such as those involved here wherein it is alleged that Watson's interstate rights are being used as a subterfuge to evade lawful state regulation through the device of routing normally intrastate traffic across the Iowa State line and back.

The Court in *Service Storage* quoted from *Castle v. Hayes Freight Lines*, 348 U.S. 61, 63-64 (1954) as follows:

> "Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce." We

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[1] It is interesting to note that Justice Blackmun, then a Circuit Judge, was one of the three judges on this panel.

> pointed out that 49 U.S.C. § 312 provides "that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided' . . . . Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate."

359 U.S. at 176. The Court continued, concluding that:

> It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action. The Commission has long taken this position.

359 U.S. at 177.

The petitioners have the burden of proof in this case, as the Commission held, to show that "the considered traffic is intrastate in character" rather than interstate commerce. *Missouri Public Service Commission* v. *Missouri Arkansas Transportation Co.*, 103 MCC 641, 649 (1967). The petitioners failed to carry this burden.

On the question of circuity, I agree with the majority that petitioners have failed to carry their burden of proof. The Michigan Public Service Commission asserts that its data indicated a degree of circuity of 92% with respect to Hover's Michigan operations which are at issue. Petitioners claim that the ICC improperly and erroneously relied instead on a 24% circuity factor. The ICC explained its calculation in footnote 3 to its opinion:

> This figure takes into account all traffic moving to and from defendant's Michigan terminals (including traffic with origins or destinations outside Michigan). The higher circuity factor proposed by complainant only includes Michigan-to-Michigan traffic. Because all traffic moves in the same

> vehicles to and from South Bend, it is inappropriate to exclude arbitrarily the traffic moving ultimately to or from points outside Michigan. If defendant [Hover] has a trailer moving to or from South Bend containing traffic destined to points beyond Michigan, the degree of circuity involved in that trip cannot be analyzed properly by excluding that traffic.

J/A at 12 n.3.

Petitioners complain that this is a "new approach to determining circuity" or a "total departure" and is "wrong." MPSC Brief at 18; Allied Brief at 9. Allied also complains about the ICC's statement that "[c]ircuity . . . does not play a major role in evaluating whether a LTL carrier's operation across a State line is reasonable and logical." J/A at 11. Allied argues also that the proof shows that "Michigan to Michigan service conducted by Hover . . . comprised 59% of Hover's overall number of shipments" during a study period, and that 75% of Hover's revenues were "derived from shipments with an origin or destination or both *within the State of Michigan.*" Allied Brief at 9-10 (emphasis in original).

ICC has the responsibility to make the factual determinations concerning circuity. *Eichholz* v. *Public Service Commission*, 306 U.S. 268, 274 (1939). It has the duty then to consider all the evidence submitted on this question, to analyze it, and to make a decision about the degree of circuity involved, and which factors and data bear most heavily upon that determination. I am in agreement that we should not disturb the ICC findings on degree of circuity even if we entertain some doubt about the logic of its approach and even if the method utilized in this case is a new and total departure from its prior approach to calculation the degree of circuity, unless this calculation and approach may be shown to be arbitrary and capricious with respect to review of ICC orders.

I have concern, however, with respect to the conclusion reached by the ICC that the circuity factor "does not play a major role" in the evaluation process of whether or not

subterfuge is present. The Supreme Court affirmed a three-judge court decision, *Jones Motor Co.* v. *United States*, 218 F. Supp. 133 (E.D. Pa. 1963), *sub nom.*, in *Highway Express Lines, Inc.* v. *Jones Motor Co.*, 377 U.S. 217 (1964) (per curiam), setting aside an ICC determination of subterfuge based solely on circuity. *Jones*, however, does not translate into a conclusion that circuity is not a major or principal factor, though not the sole or predominant one, in deciding whether or not a motor carrier has engaged in subterfuge. It was described as a "significant factor" in *Pennsylvania Public Utilities Commission* v. *Arrow Carrier Corp.*, 113 MCC 213 (1971), *aff'd* 1973 Fed. Carr. Cas. 419 (M.D. Pa. 1973) (three judge court), *aff'd mem.*, 415 U.S. 902 (1974). I agree with this description and would hold that, in a case of this nature, the factor of circuity is substantial and must be given full consideration, together with the other factors herein discussed, in determining the question of bad faith or subterfuge.

I would, then, remand this matter to the ICC for reconsideration of the question of circuity as having a *significant role*, rather than denigrating it as "not a major" one. I would expect also that upon remand ICC would explain its rationale for its new approach in calculating the degree of circuity in order to demonstrate that its methodology on circuity is not arbitrary and capricious but rather rational.

I am in agreement also with the majority's discussion of economic or operational justification for the ICC's decision under review. It is important to remember that Hover is an LTL carrier, one which handles many "less than truckload shipments in Michigan and in other states." It described its method of operation and the Commission essentially found it to be functionally efficient and logical.

> Hover currently operates a break-bulk operation. Its main hub facility is located in South Bend, Indiana. Hover operates by collecting freight from the originating points by peddle runs. Such freight is first consolidated at Hover's satellite terminals and then line-hauled to the central South Bend ter-

> minal. After being sorted, individual packages are line-hauled back out to the satellite terminals closest to their ultimate destinations, where they are then, delivered via peddle runs.

Thus, the Commission correctly found that Hover's method of operation was justified.

My disagreement with the majority relates to the question of bad faith in this case. The latest statement of the tests for bad faith may be seen in *Corporation Commission of Oklahoma* v. *Film Transit, Inc.*, MC-C-10802 (3/10/82):

> The tests to determine whether transportation between two points in the same State performed through a point in another State is truly interstate in nature or a subterfuge to avoid State regulation are set forth in *Pennyslvania P.U.C.* v. *Arrow Carr. Corp.*, 113 M.C.C. 213, 219 (1971), affirmed *Pennsylvania P.U.C.* v. *United States*, 1973 F. Carr. Cas. 82,419 (M.D. Pa. 1973), (*Pennsylvania*). The Commission and the Courts have looked to the "reasonableness" of a carrier's *modus operandi*, as evidenced by (1) the degree of circuity involved in the interstate route when compared with the local route normally employed by the intrastate carriers, (2) the presence or absence of economic or operational justification for such routing apart from the carrier's lack of intrastate authority and desire to transport otherwise unavailable traffic, and (3) the incidental or dominant character of the intrastate traffic as a portion of the carrier's operation.

Slip Op. at 2.

Most of the cases cited by the parties do not involve concrete evidence of bad faith actions which indicate directly, rather than through inference, that a carrier has sought to evade a particular state regulatory control. Analysis of the tests, then, is the means used by the Commission and the courts to determine whether there is subterfuge. In this case,

ICC took note that "Hover acknowledges the *unlawful operations* it permitted in 1986 . . . ." J/A at 10. In its brief, MPSC argues, moreover, that "Hover continued to provide false documentation and affidavits containing falsified information to make the direct Michigan to Michigan shipments appear as though they had been routed through South Bend, Indiana." MPSC Brief at 26. ICC makes no mention of these charges, simply observing that Hover instituted procedures "to ensure that such movements never occur again." J/A at 10. Mr. Van Bokkem testified also regarding an incident bearing on this position:

> Q. Mr. Van Bokkem, do you ever recall telling a newspaper reporter that by moving your facilities from Niles to South Bend that you could in fact serve the State of Michigan without holding authority from the Michigan Public Service Commission?
>
> A. I said something to that effect, yes.
>
> Q. And would you have said that in about 1983?
>
> A. That would have been 1983, yes.
>
> Q. Who was the reporter that your spoke to at that time?
>
> A. I don't know. It was some local paper.

J/A at 67-68.

This testimony might be taken as some evidence of an intent to subvert or evade regulation by Michigan authorities, which is material to any inquiry about subterfuge. ICC, however, in its opinion, makes this observation concerning this Van Bokkem statement, which petitioners claim is part of the evidence "that Hover's sole purpose in moving . . . was to avoid MPSC regulation." J/A at 13.

> In any event, *motivation is not relevant* here because the criteria set forth in *Arrow*, *supra*, have been met.

Id. (emphasis added).

I am at a loss to understand this part of the ICC's conclusions in this controversy. Evidence of bad faith is, indeed, highly relevant to any ultimate determination of subterfuge to circumvent legitimate state regulation. I am aware that in another part of the ICC opinion at issue the Commission finds that the Van Bokkem statement "does not form any basis . . . to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation." *Id.* Absent the conclusion that "motivation is not relevant," perhaps ICC has chosen a rational explanation for Van Bokkem's admission. I am persuaded, however, that there should be a remand to the ICC for a clear explanation of its rationale concerning the alleged "bad faith" actions of Hover which, are the focus of much of petitioners arguments, recognizing that "no single factor" is controlling.

I would **DISSENT**, therefore, to the extent that I believe a **REMAND** is required for further clarification and explanation of ICC on the circuity and direct evidence of "bad faith" questions in this case.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30092

MICHIGAN PUBLIC SERVICE COMMISSION

v.

HOVER TRUCKING COMPANY OF MICHIGAN

Decided: March 3, 1989

By complaint filed under 49 U.S.C. 11701 on March 21, 1988, as amended, Michigan Public Service Commission (MPSC or complainant) seeks a finding that operations by Hover Trucking Company of Michigan (Hover or defendant) from origins in Michigan to destinations in Michigan moving through Hover's South Bend, IN break-bulk and consolidation facility are not lawfully conducted pursuant to its interstate authority, but are instead shipments moving in intrastate commerce. Complainant seeks various additional relief if we determine that these operations are in intrastate commerce. By decision served May 17, 1988, the proceeding was set for handling under the modified procedure and the Regular Common Carrier Conference (RCCC) and Allied Delivery System, Inc. (Allied), individually, and Alvan Motor Freight, Inc., Central Transport, Inc., TNT Holland Motor Express, Inc., and Parker Motor Freight, Inc. (Alvan), jointly, were permitted to intervene in support of MPSC. Complainant and intervenors Allied, RCCC, and Alvan have filed opening statements, Hover has replied, and the former have filed rebuttal materials.

PRELIMINARY MATTERS

Intervenor Allied moves to strike Appendix C to defendant's statement and the references to it in the state-

ment. This material describes the nature of Allied's handling of less-than-truckload (LTL) traffic through break-bulk terminals. Hover replied to the motion. Allied correctly points out that its handling of this traffic is not relevant to the lawfulness of defendant's operations. Accordingly, the motion will be granted and the material stricken from the record.

Complainant and intervenors Alvan and RCCC move to strike portions of the statement by Hover witness Tony Van Bokkem describing an opinion by a Commission field auditor concerning the lawfulness of Hover's operations. Hover replied to the motion. This motion goes more to the weight to be afforded the evidence than to its admissibility. Therefore, the motion will be denied.

Finally, Hover moves to strike: (1) a portion of the statement of Catherine Fisher, submitted as Appendix B to complainant's rebuttal, in which she testifies as to facts based on statements made to her by a former driver for a Hover agent; (2) a portion of complainant's rebuttal brief containing evidence derived from a computer study that it claims does not support the testimony given; and (3) assertions in the rebuttal arguments of complainant and intervenor Alvan concerning average daily traffic volumes between individual Hover terminals in Michigan that it contends are not derived from the evidence of record. Complainant and intervenor Alvan replied to the motions. Embraced within complainant's and Alvan's replies are motions to strike Hover's motions. Hover replied to each motion. Hover's three motions to strike will be denied as, once again, they go more to the weight to be afforded the evidence than to its admissibility. In view of our action, the motions to strike Hover's motions are moot.

BACKGROUND

Hover holds nationwide authority to transport general commodities in Certificate No. MC-101619. Prior to 1979, Hover conducted operations as a local interline carrier in southwest Michigan and northern Indiana. Hover's operations were performed through a single terminal located in

Niles, MI, and Hover served primarily as a connecting line for longer haul carriers.

In 1979, Tony Van Bokkem and two other individuals assumed control of Hover. During these initial years, large portions of Hover's traffic continued to consist of interline freight moving in interstate commerce. Hover picked up or delivered freight in southwest Michigan and northern Indiana using its terminal at Niles, and it interlined freight with other carriers at South Bend. Hover then expanded its own single-line operations. By late 1982, Hover states that it outgrew its existing terminal at Niles, which had 20 doors and 3,000 square feet of platform space. In June 1983, Hover moved to a facility in South Bend with 37 doors and over 12,000 square feet of dock space. In June 1985, Hover moved to its present South Bend facility. It is even larger, with 48 doors and over 20,000 square feet of platform space.

During this period of expansion, Hover established a network of agency terminals that provided local pickup and delivery services for its freight within their respective territories. Hover has three such terminals in Wisconsin, one in Kentucky, six in Illinois, four in Indiana, three in Ohio, and seven in Michigan.

With this expansion, Hover continued its service pattern of moving traffic through its headquarters' break-bulk and consolidation facility at South Bend. Shipments picked up by Hover (through the operations of agents) were brought to the agents' facilities, loaded onto trailers moving to South Bend, sorted at South Bend onto trailers moving to the appropriate destination agency terminals, and ultimately delivered by the destination agents. This method of service assertedly allowed Hover to avoid inefficient movements of small amounts of freight between individual terminals by combining all over-the-road movements into one or more trailers moving to South Bend, thus enabling Hover to offer overnight service within its area of operation.

Complainant contends that, by transporting freight between Michigan points through its South Bend facility, Hover provides extremely circuitous transportation services. Com-

plainant contends that this is not a *bona fide* interstate operation and is conducted in bad faith as a subterfuge to escape Michigan jurisdiction. It argues that Hover's service between Michigan points is unlawful, unreasonable, and an abuse of its ICC certificate.

MPSC submitted a March 1988 study of Hover's operations conducted by Rodney F. Krietemeyer of the Michigan State Police. According to this study, moving shipments with a Michigan origin and destination through South Bend resulted in a circuity factor of 92 percent.[1] Complainant asserts that this traffic is the dominant part of Hover's overall operations, that there is no economic or operational justification in routing the traffic through South Bend, and that it results in costs exceeding revenues.

Complainant contends that Hover's sole purpose in relocating its terminal headquarters from Niles to South Bend was to enable it to offer substantial discounts on freight moving from Michigan origins to Michigan destinations pursuant to its interstate tariff. Hover's interstate rates are assertedly up to 40 percent lower than Michigan intrastate rates. Complainant further notes that, in a complaint proceeding before MPSC, Hover admitted that it had transported some shipments from Michigan origins to Michigan destinations without first moving the shipments through South Bend (or otherwise across State lines), and without the requisite MPSC operating authority.

In a statement appended to complainant's brief, Catherine Fisher, an officer with the Michigan Department of State Police, Motor Carrier Division, states that she interviewed a driver for Hover's agency terminal in Manton, MI who stated that direct runs of full trailerloads of freight moved from Manton to Flint, MI without first moving through Hover's South Bend facility. MPSC also includes a study by Glenn L. Fast, a transportation consultant, of 14 Michigan to Michigan

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[1] This means that the mileage involved in a movement through South Bend is, on the average, 92 percent greater than the mileage involved in a direct movement between the involved points.

shipments moving through South Bend that assertedly were non-compensatory because of the circuity. Finally, Sittichai Anprasert, an economic analyst with MPSC, indicates on behalf of MPSC that, during March 1988, "Michigan intrastate truck shipments" were responsible for 14.72 percent of Hover's systemwide operating revenues.

Intervenor Allied expresses its concern over business lost to interstate carriers, such as Hover, whose routing traffic out-of-state enables them to charge lower, interstate rates. RCCC believes that Hover's admission of past unlawful operations demonstrates that its operations through the South Bend terminal are inefficient. Alvan also focuses on Hover's past unlawful operations, which, it argues, warrant a finding that the routing of traffic through South Bend is merely a subterfuge to avoid MPSC regulation.

In reply, Hover notes that its operating system has evolved into a system similar to the break-bulk systems of other carriers with which Mr. Van Bokkem was familiar. Hover is able to maintain close control over all its shipments because the freight is handled through one terminal facility. All vehicles are based at that facility, and all freight pickups are returned to that facility, for transfer onto delivery vehicles for the next day's operation. When it began to establish agency stations, the pattern of moving all freight through the South Bend terminal continued. Agents do not become involved in the preparation of paperwork, dispatch, and other shipment responsibilities which, assertedly, are best performed by headquarters' personnel. The agent's sole function is to pick up freight and load it unsorted onto line-haul trailers moving to Hover's main terminal.

Hover notes that its use of a break-bulk and consolidation terminal as a gathering point for freight moving throughout its system ensures that it will be able to load that freight onto units outbound from South Bend and reach all of its destination terminals by the following morning. Hover thus avoids holding freight at an origin terminal because of lack of sufficient volume on a particular evening to move it to a par-

ticular destination terminal. It also avoids the problem of low freight density between its individual terminals. Hover finds it more efficient and economical to load line-haul vehicles to maximum capacity and make full-volume round trip runs to and from South Bend than to have these vehicles fan out between individual terminals at less than full capacity.

Hover further notes that the design of its system is similar to that of many other carriers, particularly those concentrating on the movement of packaged or LTL freight. In LTL operations, the critical factor is said to be not the number of miles a particular shipment travels, but the carrier's overall cost of transporting all of its shipments.

Hover states that it lacks sufficient freight volume between terminals to support a nightly trailer dispatch service at each. The largest average volume between any of these terminal combinations is slightly in excess of 7,500 pounds nightly in each direction, while volumes for other combinations are as little as 1,000 pounds nightly, in each direction. Hover avers that it would be impossible to sustain a system of direct runs between these individual terminals given such volumes. By contrast, aggregating all freight moving to and from the Michigan terminals into combined loads to or from South Bend results in an average trailer load factor of 22,000 pounds. The average two-way flow of traffic between the Michigan terminals and the South Bend consolidation facility ranges between 30,000 and 80,000 pounds per terminal. When these economics are extended across the breadth of Hover's system, use of its South Bend facility is said to reduce both the total vehicle miles traveled and the number of vehicles operated.

Responding to MPSC's circuity calculations, Hover notes that the study focuses only on the traffic moving to and from its Michigan terminals that has both an origin and destination in Michigan, but that it ignores the large volume of shipments moving to and from points outside Michigan through South Bend. According to Hover, a more realistic analysis of circuity focuses on the total traffic moving to or from these ter-

minals. By thus considering the total number of shipments moving between terminals, the circuity factor is reduced from 92 to 24 percent.

In response to MPSC's allegations that the Michigan-to-Michigan traffic constitutes a significant portion of its system-wide traffic, Hover calculates, based upon MPSC's March 1988 traffic study, that only 9.94 percent are shipments which, but for the move through its South Bend facility, would otherwise be intrastate.

Hover acknowledges the unlawful operations it performed in 1986 and details the procedures that it instituted to ensure that such movements never occur again. It also submits a verified statement from its agent at the Manton terminal that indicates that the direct runs between Manton and Flint alleged by MPSC were not made by Hover, but by a Canadian carrier.

In rebuttal, complainant concedes that it neglected to exclude certain interline shipments from the intrastate portion of its traffic study, thereby inflating the overall percentage of shipments by Hover that complainant claimed to be intrastate in its opening statement (although it also claims a minor discrepancy in defendant's methodology). Allied and Alvan attack the efficiency of Hover's South Bend terminal operations and propose other methods of handling this traffic on a purely intrastate basis. Finally, RCCC argues that Mr. Van Bokkem is not a credible witness because of a discrepancy between an affidavit he submitted in the underlying MPSC proceeding and a stipulation and agreement he signed in that proceeding concerning the routing of shipments transported during 1986. This discrepancy is said to impeach Mr. Van Bokkem's credibility.

DISCUSSION AND CONCLUSIONS

It is well settled that the burden of proof in a complaint proceeding alleging unlawful operations is on the complainant. *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. 303 (1965); *Missouri Pub. Ser. Comm.* v.

Missouri Arkansas Transp. Co., 103 M.C.C. 641 (1967). Moreover, it is long established that, subject to the exception discussed below, the transportation of property by motor vehicle between points in the same State, through another State, is transportation in interstate commerce subject to the jurisdiction of this Commission, and that transportation crossing a State line is always in interstate commerce, regardless of how small a distance may be traversed in the other State. *See* 49 U.S.C. 10521(a)(1)(B); *Greyhound Lines* v. *Mealey*, 334 U.S. 653, 660-661 (1948).

The theory of the complaint in this case is based on the principle that a carrier may not use its interstate operating authority to evade legitimate State regulation of intrastate commerce. Transportation provided between points in the same State through another State is unlawful and beyond the scope of a carrier's interstate operating authority when it is conducted as a subterfuge to avoid State regulation or in bad faith. The leading case in this area is *Pennyslvania P.U.C.* v. *Arrow Carrier Corp.*, 113 M.C.C. 213 (1971) (*Arrow*)

In determining whether bad faith or subterfuge is involved, the Commission and courts generally look to the reasonableness of the carrier's manner of operations, as evidenced by: (1) the degree of circuity involved in the interstate route when compared with the routes of intrastate carriers; (2) the presence or absence of economic or operational justification for such routing apart from a carrier's potential lack of intrastate authority or, if relevant, desire to transport otherwise unavailable traffic; and (3) the relationship of the traffic which would otherwise be intrastate traffic to the carrier's overall operations. No single factor is controlling, nor is there any presumption in favor or against any one. *Arrow*, *supra*, at 220.

We previously have recognized that the first *Arrow* test, circuity, does not play a major role in evaluating whether a LTL carrier's operation across a State line is reasonable and logical. In *Rock Island*, *supra*, we held that, where LTL traffic is concerned, circuity alone cannot determine the lawfulness of an operation, because a circuitous operation

through a consolidation terminal can be more logical and efficient than a more direct operation. In *Missouri, supra*, we similarly recognized that, as a matter of economic and practical necessity, LTL traffic generally must be handled through terminals for consolidation and break-bulk, notwithstanding that this often results in circuitous routing.[2]

In any event, the degree of circuity in Hover's operations is well within the degree of circuity previously found to be acceptable. We find that the appropriate circuity factor is 24.2 percent.[3] This amount is well within the 74.9 percent circuity factor found to be acceptable in *Jones Motor Co.* v. *United States*, 218 F. Supp. 133 (E.D. Pa. 1963), *aff'd on rehearing*, 223 F. Supp. 835 (E.D. Pa. 1963), *aff'd per curiam sub nom., Highway Express Lines* v. *Jones*, 377 U.S. 217 (1964), *rehearing denied sub nom., Pennsylvania Pub., Util. Comm.* v. *Jones Motor Co., Inc.*, 377 U.S. 984 (1964). Accordingly, we conclude that the circuity of operation experienced by Hover in moving shipments to and from its South Bend break-bulk facility is an ordinary and routine facet of the business of transporting less-than-truckload shipments of general commodities through such a facility.

As to the operational justification for Hover's use of its headquarters' consolidation terminal at South Bend, we have recognized repeatedly that operating through a consolidation terminal is a reasonable manner of transporting LTL,

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[2] Developments since 1980 in both trucking and air freight and passenger service indicate the increasing use of "hub" operations such as Hover's to increase traffic density and lower overall cost.

[3] This figure takes into account all traffic moving to and from defendant's Michigan terminals (including traffic with origins or destinations outside Michigan). The higher circuity factor proposed by complainant only includes Michigan-to-Michigan traffic. Because all traffic moves in the same vehicles to and from South Bend, it is inappropriate to exclude arbitrarily the traffic moving ultimately to or from points outside Michigan. If defendant has a trailer moving to or from South Bend containing traffic destined to points beyond Michigan, the degree of circuity involved in that trip cannot be analyzed properly by excluding that traffic.

general-commodity traffic, even when it involves moving single-State traffic through a terminal in another State. In *Rock Island, supra*, at 306 and 311, it was recognized that circuity alone cannot determine the lawfulness of an operation, because operations through a consolidation terminal are natural and logical, and more efficient than direct operations with respect to such traffic. In *Missouri, supra* at 674, it also was acknowledged that, as a matter of economic and practical necessity, LTL traffic generally must be handled through terminals for assembly, consolidation, and distribution, nothwithstanding that this often results in circuitous routings. In *Pennsylvania Public Utility Comm.* v. *Leonard Exp.*, 107 M.C.C. 451, 456 (1968), it was stated that a logical and normal operation through the carrier's headquarters or base of operations is a prime justification for an interstate routing and counterindicatory of subterfuge to avoid State regulation.

We also note that the finding of subterfuge in *Haley, P.U.C. of Oreg.* v. *City Transfer*, 112 M.C.C. 80 (1970), rested in large measure, on the fact that the interstate operation was not through the carrier's headquarters or base of operations in the other State, but rather commenced or terminated at its headquarters in the same State in which the challenged traffic was picked up and delivered. Here, we note that the South Bend location for defendant's facility is a logical choice considering the fact that Hover's operations encompass the six-State area of Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan. Geographically, South Bend is centrally located in this area.

Complainant avers that Hover's sole purpose in moving its headquarters to South Bend was to avoid MPSC regulation. It bases this conclusion upon a statement by Mr. Van Bokkem to a newspaper reporter at the time of the move in which he acknowledged that, in moving to South Bend, Hover could serve Michigan without holding MPSC authority. This does not form any basis for us to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation. In any event, motiva-

tion is not relevant here because the criteria set forth in *Arrow*, *supra*, have been met.

We find the assembly of Hover's Michigan freight into combined inter-terminal loadings to and from South Bend a logical solution for a carrier that has relatively light volumes of freight moving between most of its individual terminals. The evidence shows that Hover lacks sufficient freight volume between its Michigan terminals to establish a system of regular direct runs between those terminals. Of the various combinations of Michigan terminals, the largest average two-way volume is some 7,500 pounds nightly in each direction. Volumes for other traffic lanes between Michigan terminals are as low as 1,000 pounds nightly in each direction. Direct, over-the-road movements between individual terminals generally would not be economically feasible with such small volumes of freight.

By contrast, when Hover consolidates trailerloads for movements to or from South Bend, its average trailer load factor is approximately 22,000 pounds. This system gives Hover the advantage of scale economics generated *both* by the aggregation of traffic moving between Michigan terminals and with the much larger volume of traffic moving between these terminals and points outside of Michigan. Additionally, it allows Hover to provide overnight service on much traffic that otherwise would not receive it.

Consequently, we conclude that Hover's use of its South Bend facility is a reasonable, logical, and normal way of handling LTL traffic.

Finally, concerning the incidental or dominant nature of the single-State traffic involved, we are presented with various figures from the parties describing the single-State traffic as a percentage of systemwide revenues, as a percentage of systemwide shipments, and as a percentage of total weight. The percentage of systemwide shipments which would otherwise be unauthorized if moved direct rather than through its South Bend facility most accurately reflects the relative amount of single-State, in relation to system-wide transportation. This calculation takes into account ad-

justments for single-State shipments interlined with other carriers at points outside of Michigan and shipments between points in Michigan that Hover is authorized to serve under its MPSC authority. The single-State shipments constitute 9.94 percent of system-wide shipments. This figure is well within the calculation in *Jones, supra*, where 16.9 percent of system-wide shipments was found to constitute an incidental amount.

In summary, we find that complainant has failed to establish that defendant routes traffic moving between points in Michigan through South Bend as a subterfuge to transform intrastate traffic into interstate traffic so as to avoid Michigan's regulatory jurisdiction.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Allied's motion to strike Appendix C to defendant's verified statement and all references to it in that statement is granted and the material stricken from the record.

2. The remaining motions to strike filed by complainant, defendant, and intervenors are denied.

3. This proceeding is discontinued.

4. This decision is effective on its date of service.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX C

No. 89-3383/3401/3414

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLIED DELIVERY SYSTEM, INC. (89-3383), ALVAN MOTOR FREIGHT INC.; TNT HOLLAND MOTOR EXPRESS, INC.; and PARKER MOTOR FREIGHT, INC., (89-3401),
and
STATE OF MICHIGAN; and MICHIGAN PUBLIC SERVICE COMMISSION (89-3414),
Petitioners-Appellants,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents,

HOVER TRUCKING COMPANY, OF MICHIGAN,
Respondent-Intervenor

ORDER
(Filed September 10, 1990)

BEFORE: WELLFORD and NELSON, Circuit Judges; and EDWARDS, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

APPENDIX D

49 § 10521 General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier—

(1) between a place in—

(A) a State and place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not—

(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate

transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

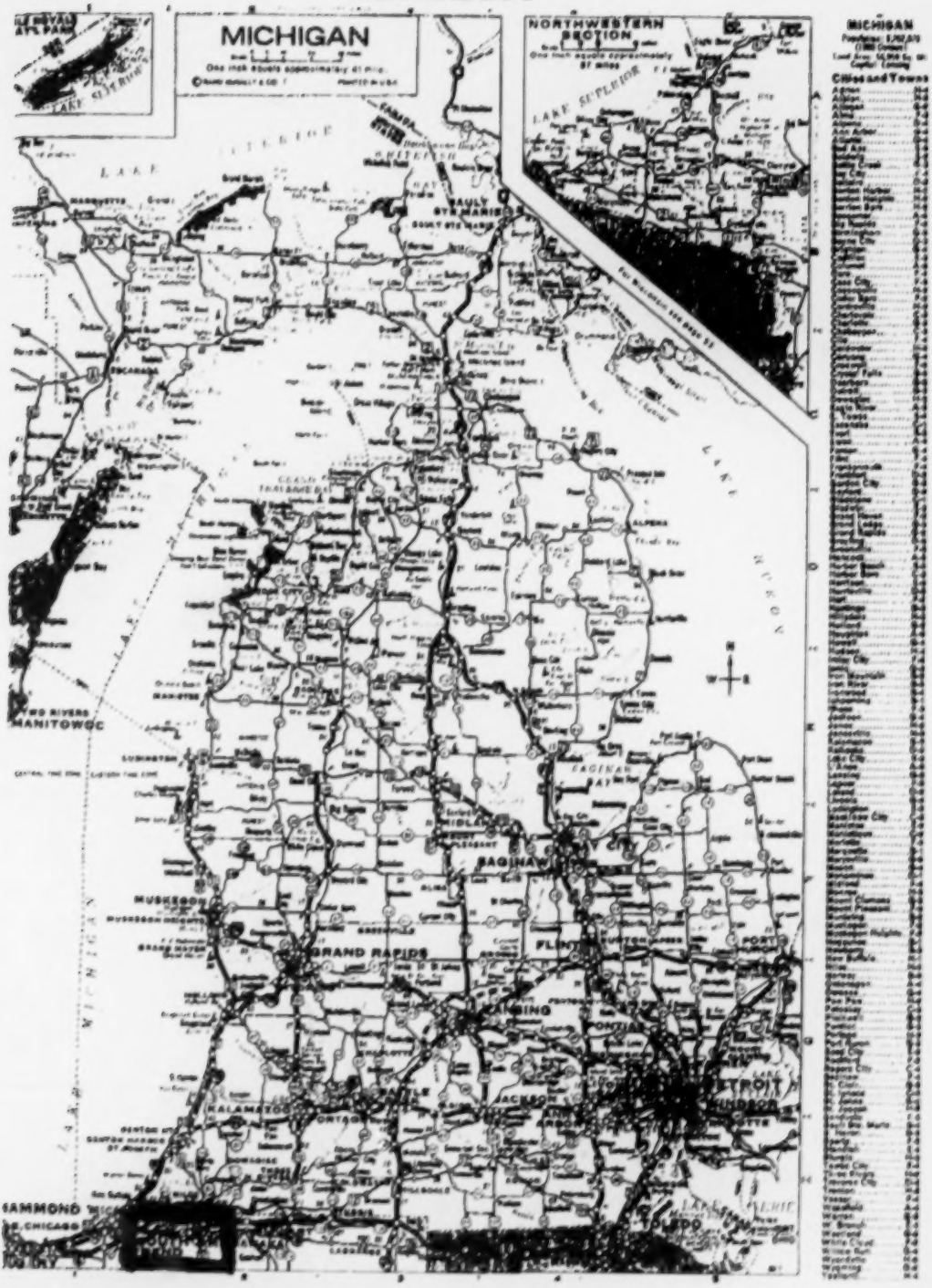
(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-296, § 31(b), July 1, 1980, 94 Stat. 824; Pub.L. 97-261, § 6(f), Sept. 20, 1982, 96 Stat. 1107; Pub.L. 99-521, § 6(a), Oct. 22, 1986, 100 Stat. 2994.)

APPENDIX E

Date	Pro. No.	Origin	Destination	Direct Miles	Hover Factor	Circuity
1/13/86	JX012107	Adrian	Gr. Rapids	133	243	83
1/13/86	56010985	Bay City	Clawson	87	397	356
1/13/86	OT033981	Detroit	Kalamazoo	132	249	89
1/13/86	OT033982	Detroit	Port Huron	57	417	631
1/13/86	FL002049	Mt. Clemens	Owosso	84	345	311
1/13/86	GR019077	Gr. Haven	Kalamazoo	71	183	158
1/13/86	GR019063	Gr. Rapids	Charlotte	61	235	285
1/13/86	JZ012100	Jackson	Charlotte	36	236	556
1/13/86	FL002447	Pontiac	Bay City	80	409	411
1/13/86	SG011001	Ubly	Port Huron	72	495	588
1/13/86	OT003999	Redford	Cass City	94	423	350
1/14/86	GR019099	Gr. Rapids	Ann Arbor	128	264	106
1/14/86	OT034035	Sterl. Hgts	Essexville	94	397	322
1/14/86	OT034060	Warren	Pontiac	23	374	1526
1/15/86	OT034080	Detroit	Monroe	36	350	872
3/1/88	SA004296	Bad Axe	Muskegon	113	317	181
3/1/88	OT055711	Detroit	Mt. Clemens	25	372	1388
3/1/88	PN004873	Holly	Lansing	81	305	277
3/1/88	GR041025	Greenville	Sterling Hgts	134	304	127
3/1/88	SA004280	Pinconning	Belleville	102	318	212
3/1/88	SA004293	Port Austin	Warren	94	385	310
3/1/88	SA004273	Saginaw	Lansing	102	318	212
3/2/88	SA004303	Bay City	West Branch	113	317	181
3/2/88	OT055742	Detroit	Lapeer	56	372	564
3/2/88	GR041488	Gr. Rapids	Flint	113	318	181
3/2/88	JX026914	Howell	Detroit	72	293	307
3/2/88	JX026917	Hamburg	Rochester Hls.	81	305	277
3/2/88	PN003785	Troy	Chelsea	81	305	277
3/2/88	PN003784	Mt. Clemens	Vassar	69	397	475
3/2/88	SA004311	Kingston	Rochester Hls.	69	397	475

The ICC circuity factor is figured by taking the mileage increase from the circuitous Hover routing and calculating the percentage increase. For example on the first shipment, Pro No. JX012107, Hover travelled an additional 110 miles over the direct route miles of 133 — 110 is 83% of 133, yielding the 83% circuity factor.

APPENDIX F



(2) (2)

Nos. 90-926, 90-966

In The

Supreme Court of the United States

October Term, 1990

STATE OF MICHIGAN;
and MICHIGAN PUBLIC SERVICE COMMISSION,

Petitioners in No. 90-926,

and

ALLIED DELIVERY SYSTEM, INC.;
ALVAN MOTOR FREIGHT, INC.;
and PARKER MOTOR FREIGHT, INC.,

Petitioners in No. 90-966,

vs.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA; and
HOVER TRUCKING COMPANY OF MICHIGAN,

Respondents.

BRIEF OF RESPONDENT HOVER TRUCKING COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Dated: January 7, 1991

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER THE INTERSTATE COMMERCE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY, OR IN EXCESS OF STATUTORY AUTHORITY IN FINDING THAT HOVER TRUCKING COMPANY OF MICHIGAN'S METHOD OF CONDUCTING ITS INTERSTATE TRUCKING OPERATION IS "REASONABLE, LOGICAL, AND NORMAL."

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In The

Supreme Court of the United States

October Term, 1990

STATE OF MICHIGAN;
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Petitioners in No. 90-926,

and

ALLIED DELIVERY SYSTEM, INC.;
ALVAN MOTOR FREIGHT, INC.;
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vs.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA; and
HOVER TRUCKING COMPANY OF MICHIGAN,

Respondents.

BRIEF OF RESPONDENT HOVER TRUCKING COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Respondent Hover Trucking Company ("Hover")[1] accepts the procedural history of this case submitted by

[1] Hover Trucking Company of Michigan, a Michigan corporation, the Defendant and Appellee in the proceedings below, was merged into Hover Trucking Commpany, an Indiana corporation, effective December 3, 1989. That merger does not affect the issues in this proceeding and the corporate entities will be referred to jointly as "Hover." Hover Trucking Company has no parent or subsidiary corporations.

Petitioners. For a factual summary of the case, Hover asks that the Court refer to the "Background" portion of the Interstate Commerce Commission decision below. (20a-25a)[2]

SUMMARY OF ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

Petitioners advance no convincing explanation as to why this Court should venture into the technical *minutiæ* of a case involving a statutorily based principle of law resolved conclusively by this Court in 1959. The sole issue in this case is whether the Interstate Commerce Commission ("ICC") properly exercised its jurisdiction under 49 USC § 10521(a)(1)(B) to regulate transportation "between a place in a State and another place in the same State through another State." Employing an analysis specifically approved by this Court in *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959), the ICC ruled that Hover's decision to perform service between points in Michigan through a "hub" terminal at South Bend, Indiana, along with service between five other midwestern states was "reasonable, logical, and normal." This is the very test approved and applied by this Court in *Service Storage*. Petitioners' unwarranted claims that the ICC used improper methods for calculating "circuity" in Hover's operation or assessing alleged evidence of "bad faith" fall far short of justifying reentry by this Court into an area of law which has been well settled for over thirty years.

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[2] All references to Appendix pages in this brief are to the Appendix to the petition of the State of Michigan, et al., in No. 90-926.

ARGUMENT

Notwithstanding Petitioners' claims of undue interference and impending destruction of restrictive state regulation of intrastate commerce, the fact remains that Congress has explicitely stated that transportation between points in a single state through another state is interstate commerce subject to the statutory authority of the ICC. 49 USC § 10521(a)(1)(B). Any concerns which might have existed as to the relative primacy of state and federal regulatory systems over shipments moving between points in a single state via routes through another state thus have been resolved conclusively by Congress. That resolution places the shipments at issue squarely within the jurisdiction of the ICC. The possibility that the ICC's regulation of market entry or rate levels may be less restrictive than comparable state regulation is irrelevant. Once a shipment between two points in a state crosses a state line, the unambiguous Congressional determination is that federal regulation by the ICC becomes applicable. *Greyhound Lines* v. *Mealey*, 334 U.S. 653, 660-61 (1948); *Gray Lines Tours* v. *ICC*, 824 F.2d 811 (9th Cir. 1987). The provisions of 49 USC § 10521(b) which preserve the residual powers of states to regulate intrastate transportation not regulated by the ICC do not limit the ICC's powers over the transportation of shipments which Congress has specifically directed the ICC to regulate.

While ICC case law has held that sufficiently strained or illogical routing of shipments between points in a single state through an adjoining state could be found to be a misuse of a carrier's ICC certificate, the ICC's decision that the facts of this case do not warrant such a finding cannot be considered arbitrary or capricious. One factor employed by the ICC to

evaluate alleged illogic in routing single-state shipments through an adjoining state is the mileage circuity of the interstate routings when compared to the short-line mileage. Hover argued that the proper test was to consider the mileage circuity of shipments moving between Michigan and *all* points on the Hover system via the South Bend "hub" terminal. The record indicated that Hover mixed its Michigan-to-Michigan shipments with shipments from Michigan to other states, and *vice versa* when moving shipments through South Bend. The method of analysis proposed by Hover allowed Hover to demonstrate that possible operating disadvantages of high circuity on Michigan-to-Michigan shipments could be outweighed by the benefits of low circuity on shipments between Michigan and other states. The ICC agreed with Hover's method of anaylsis. (27a)

Petitioners' argument that the ICC had not previously employed such an analysis ignores the fact that the ICC is free to make appropriate choices or alterations in its analytical methods as long as proper explanation is provided. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The ICC is not required to follow methodology employed in past cases when confronted with distinct fact situations such as those presented by Hover's "hub" method of conducting multi-state operations through a single terminal in South Bend.

There similarly was no error by the ICC in its consideration of alleged evidence of actual "bad faith" motivation of Hover in establishing its South Bend "hub" terminal. The evidence cited by Petitioners involves a statement by Hover's President to a news reporter in 1983 that opening of the South Bend facility would allow Hover to perform service between Mich-

igan points without holding authority from the Michigan Public Service Commission. (14a-15a) The ICC specifically analyzed this statement and concluded that it did not prove that Hover's purpose in establishing the South Bend terminal was to avoid regulation under Michigan law. (29a) The Sixth Circuit properly ruled that the ICC was entitled to interpret the evidence on this point and that such interpretation was not arbitrary or capricious. (9a)

Petitioners' final contention that the ICC was required to hold oral hearings in this matter is entirely without merit. The ICC considered the evidence in this case under its so-called "modified procedure" system described at 49 CFR 1112. This system satisfies all requirements of due process and procedural fairness required by the Constitution and the Administrative Procedure Act. 5 USC § 551, *et seq.*; *Trailways, Inc.* v. *ICC*, 681 F.2d 252 (5th Cir. 1982); *Crete Carrier Corp.* v. *U.S.*, 577 F.2d 49 (8th Cir. 1978). The ICC places extensive reliance on modified procedure to control what would otherwise be an unmanageable burden of oral hearings concerning cases subject to its jurisdiction. There is no basis for requiring any change in this long-approved procedural method.

CONCLUSION

The Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated:
1/7/91

Nos. 90-926 and 90-966

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ALLIED DELIVERY SYSTEM, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld a ruling of the Interstate Commerce Commission that certain motor carrier transportation between two points in Michigan through Indiana is subject to federal, rather than state, regulation.

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OCTOBER TERM, 1990

No. 90-926

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

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ALLIED DELIVERY SYSTEM, INC., ET AL., PETITIONERS

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INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is not reported. The decision of the Interstate Commerce Commission (Pet. App. 18a-31a) is not yet reported.

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[1] The petitions in Nos. 90-926 and 90-966 seek review of the same judgment on similar grounds. Our citations to "Pet. App." refer to the appendix to the petition in No. 90-926.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. A petition for rehearing was denied on September 10, 1990 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on December 10, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, the ICC exercises regulatory jurisdiction over transportation by motor carriers in *inter*state commerce. 49 U.S.C. 10521(a)(1). The statute reserves to the States authority to regulate wholly *intra*state motor transportation. 49 U.S.C. 10521(b)(1).

The interstate transportation within the ICC's jurisdiction includes transportation "between a place in * * * a State and another place in the same State through another State." 49 U.S.C. 10521(a)(1)(B). The courts and the ICC have recognized an implied exception to that element of the ICC's jurisdiction, however, for cases in which a carrier crosses state lines merely as a subterfuge to evade legitimate state regulation of intrastate commerce. See *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 179 (1959); *Eichholz* v. *Public Serv. Comm'n*, 306 U.S. 268, 274 (1939); *Pennsylvania PUC* v. *Arrow Carrier Corp.*, 113 M.C.C. 213 (1971) [hereinafter *Arrow*], aff'd *sub nom. Pennsylvania PUC* v. *United States*, 1973 Fed. Carr. Cas. (CCH) ¶ 82,419 (M.D. Pa. 1973), aff'd per curiam, 415 U.S. 902 (1974).[2]

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[2] Accord *Service Trucking Co.*, 94 M.C.C. 222, 225 (1963), aff'd *sub nom. Service Trucking Co.* v. *United States*, 239 F. Supp. 519, 521 (D.Md. 1965) (three-judge court), aff'd per curiam, 382 U.S. 43 (1965); *Pennsylvania PUC* v. *Hudson*

2. Respondent Hover Trucking Company of Michigan (Hover) is a motor carrier holding nationwide authority from the ICC to transport general commodities in interstate commerce. Pet. App. 20a. In March 1988, petitioner Michigan Public Service Commission (MPSC) filed a complaint with the ICC, under 49 U.S.C. 11701, alleging that Hover was routing shipments between points in Michigan through its South Bend, Indiana, break-bulk and consolidation facility in order to evade Michigan's regulation of motor carrier transportation within that State. Several other parties, including petitioners Allied Delivery System, Inc., Alvan Motor Freight, Inc., and Parker Motor Freight, Inc., intervened in support of the complaint. Pet. App. 18a.

The ICC heard the MPSC's complaint in accordance with its "modified procedures," 49 C.F.R. Pt. 1112, under which evidence is submitted in written form. Based upon the resulting record, the ICC concluded that the MPSC had "failed to establish that [Hover] routes traffic moving between points in Michigan through South Bend as a subterfuge to transform intrastate traffic into interstate traffic so as to avoid Michigan's regulatory jurisdiction." Pet. App. 31a.

a. At the outset, the ICC reviewed the history and basic pattern of Hover's operation. Prior to 1979, Hover operated primarily as a local interline carrier

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Transp. Co., 88 M.C.C. 745, 748 (1962), aff'd *sub nom. Hudson Transp. Co.* v. *United States*, 219 F. Supp. 43 (D.N.J. 1963) (three-judge court), aff'd per curiam *sub nom. Arrow Carrier Corp.* v. *United States*, 375 U.S. 452 (1964); *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. 303 (1965), aff'd *sub nom. Rock Island Motor Transit Co.* v. *United States*, 256 F. Supp. 812 (S.D. Iowa 1966) (three-judge court).

(a connecting line for longer haul carriers) in southwestern Michigan and northern Indiana; it conducted this business from a single terminal in Niles, Michigan. Pet. App. 20a. In 1979, under new ownership, Hover began to interline freight at South Bend, Indiana as well. *Ibid.* Hover also began to expand its own single-line operations (operations in which Hover would itself transport freight from the freight's origin to its destination). By late 1982, Hover had outgrown its Niles terminal, which had only 20 doors and 3,000 square feet of platform space. Consequently, in June 1983, it acquired a larger terminal in South Bend—with 37 doors and over 12,000 square feet of dock space—from another carrier. In June 1985, Hover moved into even larger quarters at South Bend—with 48 doors and over 20,000 of platform space—from which it currently operates. *Ibid.*

During its period of expansion, Hover established a network of agency terminals, from which agents provide local pickup and delivery services within their respective territories. Hover has three such terminals in Wisconsin, one in Kentucky, six in Illinois, four in Indiana, three in Ohio, and seven in Michigan. Pet. App. 21a. Even though its service area has expanded, Hover has continued its basic pattern of service. A shipment picked up by one of Hover's agents is first brought to that agent's terminal, where it is loaded onto a trailer moving to Hover's large break-bulk and consolidation facility at South Bend. At South Bend, shipments arriving from the agency terminals are sorted and loaded onto trailers which take them to the appropriate agency terminals for delivery to their destinations. *Ibid.*

b. Petitioners' basic contention is that the application of this system to freight moving between points

in Michigan is a subterfuge designed to avoid Michigan motor carriage regulation. Pet. App. 21a. In analyzing that claim, the ICC applied the three-part test outlined in its *Arrow* decision (Pet. App. 26a):

> In determining whether bad faith or subterfuge is involved, the Commission and courts generally look to the reasonableness of the carrier's manner of operations, as evidenced by: (1) the degree of circuity involved in the interstate route when compared with routes of intrastate carriers; (2) the presence or absence of economic or operational [justification] for such routing apart from a carrier's potential lack of intrastate authority or, if relevant, desire to transport otherwise unavailable traffic; and (3) the relationship of the traffic which would otherwise be intrastate traffic to the carrier's overall operations. No single factor is controlling, nor is there any presumption in favor [of] or against any one.

The ICC applied each of those criteria to the particulars of Hover's operation.

i. The ICC noted that circuity "does not play a major role in evaluating whether a LTL carrier's operation * * * is reasonable and logical," since "a circuitous operation through a consolidated terminal can be more logical and efficient than a more direct operation" and "as a matter of economic and practical necessity, LTL traffic generally must be handled through terminals for consolidation and break-bulk, notwithstanding that this often results in circuitous routing." Pet. App. 26a-27a; see *id.* at 27a n.2 (noting the increasing use of "hub" operations in truck-

ing, air freight, and air passenger service).[3] The ICC found that the appropriate circuity factor for Hover's operation was 24.2%, a figure well below those the ICC had found acceptable in prior cases. *Id.* at 27a. In determining the circuity of Hover's operation, the ICC included all traffic moving to or from Hover's Michigan terminals (including traffic with origins or destinations outside Michigan). The Commission rejected petitioners' position that the calculation should reflect only Michigan-to-Michigan traffic, explaining that "[b]ecause all traffic moves in the same vehicles to and from South Bend, it is inappropriate to exclude arbitrarily the traffic moving ultimately to or from points outside Michigan." *Id.* at 27a n.3.[4] The ICC concluded that "the circuity of operation experienced by Hover in moving shipments to and from its South Bend break-bulk facility is an ordinary and routine facet of the business of transporting less-than-truckload shipments of general commodities through such a facility." *Id.* at 27a.

ii. With respect to the operational justification for Hover's use of its South Bend terminal, the ICC noted that it had "recognized repeatedly that operat-

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[3] The abbreviation "LTL" refers to freight shipped in lots smaller than a single truckload. Pet. App. 19a. Carriers handling such freight must attempt to combine and route shipments in a manner minimizing their overall costs.

[4] Under the ICC's analysis, all freight originating in *or* destined for Michigan terminals travelled 24.2% farther than it would have if it had been shipped directly, without passing through South Bend. A study conducted by MPSC in March 1988 showed that the subcategory of freight originating in *and* destined for terminals in Michigan had a circuity factor of 92%. In other words, as a result of being routed through South Bend, that freight travelled 92% farther than it would have if shipped directly. Pet. App. 21a-22a & n.1.

ing through a consolidation terminal is a reasonable manner of transporting LTL, general-commodity traffic, even when it involves moving single-State traffic through a terminal in another State." Pet. App. 28a. The Commission found that "the South Bend location for [Hover's] facility is a logical choice considering the fact that Hover's operations encompass the six-State area of Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan" and that "South Bend is centrally located in this area." *Ibid.* The Commission thus rejected petitioners' contention that Hover's sole purpose in moving its headquarters to South Bend was to avoid Michigan regulation. The ICC found that a statement by Hover's principal to a reporter that the move would enable Hover to serve Michigan without obtaining MPSC authority for intrastate transportation "does not form any basis for us to conclude that the operation is not authorized or even that the purpose of the move to South Bend was to avoid MPSC regulation." *Id.* at 29a. The ICC added that "[i]n any event, motivation is not relevant * * * because the criteria set forth in *Arrow*, *supra*, have been met." *Ibid.*

Hover's operation, the ICC continued, was "a logical solution for a carrier that has relatively light volumes of freight moving between most of its individual terminals." Pet. App. 29a. Referring to evidence concerning the small volumes of freight moving between any two terminals in Michigan, the ICC found that "[d]irect over-the-road movements between individual terminals generally would not be economically feasible." *Ibid.* By contrast, the ICC continued, the system in place "gives Hover the advantage of scale economies generated *both* by the aggregation of traffic moving between Michigan terminals and with the much larger volume of traffic mov-

ing between these terminals and points outside of Michigan" and "allows Hover to provide overnight service on much traffic that would not otherwise receive it." *Ibid.* The ICC concluded that "Hover's use of its South Bend facility is a reasonable, logical, and normal way of handling LTL traffic." *Ibid.*[5]

iii. Finally, with respect to the relative significance of the single-state traffic involved in Hover's operation, the ICC found that single-state shipments constituted 9.94% of Hover's system-wide shipments. This figure, the ICC noted, was well below the comparable figure in another case in which it had sustained a carrier's position that freight was not being routed to evade state regulation. Pet. App. 30a.

3. By a 2-1 vote, the court of appeals upheld the Commission's decision in an unpublished opinion.

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[5] Hover presented evidence that its system is typical of LTL freight carriers, whose operational effectiveness depends more on keeping overall costs low than on limiting the number of miles any particular shipment travels. Pet. App. 24a. According to that evidence, use of a central terminal facility as a hub for agency terminals allows Hover to maintain control over all of its shipments at that facility; to base all of its vehicles there; to centralize paperwork, dispatch, and other shipment responsibilities in its headquarters; to dispatch freight to each of its agency stations each night (rather than having to hold it in cases where there was insufficient freight moving between particular stations); and to avoid low freight density between individual terminals. *Id.* at 23a-24a. According to Hover's evidence, the average amount of freight moving between any two of its Michigan terminals each night ranged between 1,000 and 7,500 pounds; the average two-way flow between South Bend and each Michigan terminal ranged between 30,000 and 80,000 pounds. *Id.* at 24a. The net result of the use of the South Bend facility, according to Hover's evidence, is a reduction both in the total vehicle miles travelled and the number of vehicles operated. *Ibid.*

Pet. App. 1a-16a. The majority observed at the outset that the ICC "was well within its jurisdiction" in regulating transportation between two points in a State through another State; the majority explained that the ICC's jurisdiction is not limited to situations in which that regulation would not interfere with a State's regulation of intrastate commerce. *Id.* at 5a.

With respect to petitioners' contention that Hover had employed its South Bend terminal in bad faith to evade state regulation of Michigan-to-Michigan freight, the majority held that there was substantial evidence supporting the ICC's conclusion that Hover's operation passes muster under the three-part *Arrow* analysis. Pet. App. 7a. Rejecting petitioners' contention that the Commission had misapplied the circuity factor of that analysis, the majority explained that "it is logical that the importance of the circuity factor should vary in inverse proportion to the strength of the economic or operational justification of the routing"; that "[s]poke-and-hub traffic patterns often improve efficiency by decreasing unused capacity"; and that "the ICC has long recognized that the use of such patterns may promote the efficient movement of less-than-truckload-lot shipments of freight." *Ibid.* The majority reviewed the pattern of freight moving within Hover's system and found "no basis for rejecting the Commission's conclusion that the spoke-and-hub system was more efficient overall." *Id.* at 8a.

Finally, the majority rejected petitioners' contention that the ICC had overlooked direct evidence of bad faith. Although "given pause" by the ICC's observation that motivation was irrelevant in light of Hover's showing under the *Arrow* criteria (Pet. App. 8a), the majority determined that the ICC had in fact considered the relevant evidence. The court concluded

that "it was within the Commission's province to find" that this evidence of motivation was not dispositive (*id.* at 9a). The majority was thus unwilling to disturb the ICC's decision to "giv[e] the apparent efficiency of Hover's operations more weight than the direct evidence of bad faith." *Ibid.*

Judge Wellford concurred in part and dissented in part. He would have remanded to the Commission for further consideration of the issue of circuity and petitioners' evidence regarding motivation. Pet. App. 9a-16a.

ARGUMENT

1. The basic principles applicable to this case are well established. The ICC exercises exclusive jurisdiction over motor carriage in interstate commerce, including transportation between points in a single State through a second State. 49 U.S.C. 10521 (a)(1)(B).[6] Within the scope of its jurisdiction, the Commission's authority is plenary. The statute establishes "a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. * * * No power at all was left in the states to determine what carriers could or could not operate in interstate commerce." *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 63 (1954). Cf. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (Interstate Commerce Act designed to achieve uniformity of regulation). When a carrier is operating under an ICC certificate of convenience and necessity, the Commission has primary jurisdiction to

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[6] See, *e.g.*, *Jones Motor Co.* v. *United States*, 223 F. Supp. 835, 836 (E.D. Pa. 1963) (three-judge court), aff'd per curiam *sub nom. Highway Express Lines, Inc.* v. *Jones Motor Co.*, 377 U.S. 217 (1964); *Tri-D Truck Lines, Inc.* v. *ICC*, 303 F. Supp. 631, 634 (D. Kan. 1969) (three-judge court).

determine whether particular transportation is interstate in character and thus authorized by the certificate. *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959). A State that believes that a carrier's operation "is not bona fide interstate but is merely a subterfuge to escape its jurisdiction" is required to commence a complaint proceeding before the ICC to enable the Commission to determine whether the carrier has abused its certificate. *Id.* at 179.

Thus, contrary to petitioners' contention (90-926 Pet. 11-18; 90-966 Pet. 8-9), this case presents no substantial issue regarding the division of state and federal authority in this area. The statute and this Court's decisions make clear the extent to which the ICC exercises exclusive jurisdiction and the procedures for resolving disputes as to the applicability of state and federal regulatory schemes to motor carriage. In particular, there is no conflict between the court of appeals' decision and *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). In that case, the FCC sought to regulate the depreciation of equipment that was concededly used in *intra*state telephone communication. In construing the Federal Communications Act to reserve that area to the State, the Court did not suggest any limit on the Commission's authority over *inter*state communication, the analogue of the ICC authority at issue here. See *Texas* v. *United States*, 866 F.2d 1546, 1553 (5th Cir. 1989). As the court of appeals noted, this case presents only the question whether the Commission's application of an established construction of the ICC's governing statute to the particular facts of this case should be upheld under applicable standards of judicial review.

2. As noted, the Commission and the courts have recognized a narrow exception to the Commission's

authority over interstate motor carriage for cases in which a shipment "[is] not in good faith but was a mere subterfuge to evade the state's requirement as to intrastate commerce." *Eichholz* v. *Public Service Comm'n*, 306 U.S. 268, 274 (1939). The burden of establishing the applicability of that exception is on the party challenging the Commission's jurisdiction. *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, *supra*; *Missouri Public Serv. Comm'n* v. *Missouri Arkansas Transp. Co.*, 103 M.C.C. 641 (1967). In assessing such claims, the Commission routinely employs the three-factor *Arrow* analysis that it applied in this case.

The Commission's determination that Hover's operation was not a mere subterfuge to avoid Michigan's regulation of intrastate commerce was fully justified by the administrative record. Contrary to petitioners' suggestion (90-926 Pet. 3-4; 90-966 Pet. 3-4), there was substantial evidence that Hover had relocated its headquarters for reasons other than avoiding Michigan regulation. The ICC found that "the South Bend location for [Hover's] facility is a logical choice considering the fact that Hover's operations encompass the six-State area of Wisconsin, Kentucky, Illinois, Indiana, Ohio, and Michigan" and that "South Bend is centrally located in this area." Pet. App. 28a. Petitioners' attempt to link the relocation to Hover's acquisition of ICC authority to operate interstate is unpersuasive. As the Commission noted, the company's relocation from Michigan to much large quarters in South Bend took place against the background of its evolution from a small, primarily interline carrier operating in parts of Michigan and Indiana into a far larger single-line carrier operating in six States. See *id.* at 18a.

Likewise, the record supports the Commission's conclusion that Hover's method of operations—under which LTL shipments are sent from agency terminals to South Bend and routed back to those terminals—is "a reasonable, logical, and normal way of handling LTL traffic." Pet. App. 29a. A central or regional consolidation and break-bulk facility is a routine feature of LTL operations the ICC has upheld against similar challenges. See *Missouri Pub. Serv. Comm'n* v. *Missouri-Arkansas Transp. Co.*, 103 M.C.C. at 641. See also *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. at 176.[7] In this case, the Commission found that Hover "lacks sufficient freight volume between its Michigan terminals to establish a system of regular direct runs betwen those terminals" and that the carrier's hub-and-spokes system yields significant economies of scale. Pet. App. 29a. Of course, the fact that such a system sometimes results in quite circuitous routings—a fact on which the intervenor-petitioners place great emphasis (90-966 Pet. 5-6, 18-19)—does not undermine the system's overall economic justification.

Although petitioners do not question the general validity of such a system, they find fault with two aspects of the ICC's analysis of the record in this case. Petitioners argue that the Commission improperly refused to consider so-called "direct evidence of bad faith" and misapplied the circuity factor of the *Arrow* analysis. 90-926 Pet. 5-11; 90-966 Pet. 12-24. Neither contention presents an issue warranting this Court's attention.

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[7] Indeed, other sectors of the transportation industry, most notably air carriers (moving freight as well as passengers), have increasingly adopted "hub" operations to increase traffic density and lower overall costs.

a. The ICC did not ignore evidence proffered by petitioners. After describing a statement by Hover's principal to a reporter to the effect that the move to South Bend would enable Hover to serve Michigan without authority from that State, the ICC found that this statement "does not form any basis for us to conclude that the operation is not authorized or even that the purpose of the move was to avoid [Michigan] regulation." Pet. App. 29a. Given the regulatory background, it is a fact that a move to South Bend for bona fide business reasons would have the effect of allowing Hover to serve Michigan by means of its established pattern of operations without intrastate authority. It does not follow, as petitioners suggest, that the move must necessarily have been motivated by a desire to evade state regulation. As the court of appeals explained, "[w]here the move is adequately justified on economic grounds, we cannot say that the ICC was required to find bad faith because Hover recognized the regulatory consequences as well." *Id.* at 9a.[8]

Petitioners place great emphasis on the Commission's additional observation that the evidence of motivation was not relevant "[i]n any event" (Pet.

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[8] The intervenor petitioners also highlight evidence that Hover made some unlawful direct shipments between Michigan terminals. However, Hover submitted evidence that it has established procedures to ensure that such shipments are not repeated (Pet. App. 25a), and the issue in this case is whether those shipments that did go to South Bend were routed there as part of a subterfuge to avoid state regulation. The significance due this evidence was an issue for the Commission; its assessment presents no question calling for this Court's review. See *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. at 312 (even past unsuccessful attempts to obtain intrastate authority did not warrant a finding of subterfuge for interstate routing).

App. 29a) in view of the showings that had been made in this case on the three *Arrow* factors. In context, however, that observation was at most an alternative ground for the Commission's refusal to base a finding of bad faith on petitioners' limited evidence of motivation. The Commission has not indicated that it will refuse to consider such evidence in a case in which there is room for doubt as to the bona fides of a carrier's operations. This Court's review is not warranted to address a statement in the Commission's opinion which—the opinion makes clear—had no effect on the result.

Michigan argues that, in *Service Storage & Transfer Co.* v. *Virginia*, *supra*, this Court has held that direct evidence of bad faith is controlling and that the three *Arrow* factors may be considered only in the absence of such evidence. 90-926 Pet. 7 & n.2. The Court's opinion says no such thing. See 359 U.S. at 175, 177. Indeed, since the only question decided in *Service Storage* was whether a claim of bad-faith routing should be presented to the Commission in the first instance, this Court had no occasion to consider the standards governing such claims. Moreover, a rule barring resort to the *Arrow* factors in cases of this type would be unjustifiable. Showings of the sort made by Hover in this case—that a carrier's operation is economically justified, that routings are not unduly circuitous, and that the carrier's single-State business accounts for a small percentage of its overall business—go directly to a claim that the carrier has structured its operations to evade state regulation.

b. Circuity of routing does not establish subterfuge where there is a legitimate purpose for such routing. *Gray Line Tour Co.* v. *ICC*, 824 F.2d 811, 815 (9th Cir. 1987) (involving tour bus operation).

Indeed, where LTL traffic is concerned, a circuitous operation through a consolidation terminal can be more efficient than a direct operation. *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. at 306. Thus, the proper measure of the circuity of a carrier's routings and the significance of this factor are matters within the expertise of the ICC.

The ICC's analysis of the circuity of Hover's routings was fully justified. Under Hover's system, trucks moving from each agency terminal in Michigan to South Bend carry shipments destined for other points in Michigan and for points in other States, and trucks moving from South Bend to a Michigan agency terminal carry shipments from other points in Michigan and from other States. In evaluating the justification for Hover's overall system, it was therefore reasonable for the Commission to aggregate all such shipments in determining the circuity of Hover's operation.[9] There is no merit to petitioners' contention (90-926 Pet. 8-11; 90-966 Pet. 20-22) that *Service Storage & Transfer Co.* v. *Virginia*, *supra*, and *Eichholz* v. *Public Service Comm'n*, *supra*, require the Commission to adhere to any particular analysis of the issue of circuity. Neither case addressed that question.

3. Although Michigan's petition does not present the question whether the Commission's procedures were deficient (90-926 Pet. i), Michigan argues that it should have received a "formal hearing" (*id.* at

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[9] See *Rock Island Motor Transit Co.* v. *Watson-Wilson Transp.*, 99 M.C.C. at 311 (where routings for single-state shipments through another state are similar to those used for multi-state shipments, they are not contrived or especially designed to attract normally intrastate traffic).

19-21). In this case, the Commission was operating under authority of a statutory provision, 49 U.S.C. 11701, that does not require the Commission to reach a decision on the record after an agency hearing. Thus, the APA requirements triggered by such a requirement were inapplicable. 5 U.S.C. 554(a).

The Commission heard this case in accordance with "modified procedures"—under which evidence is submitted in written form—that the ICC regularly employs in cases in which "it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony." 49 C.F.R. 1112.1. These procedures assure parties a fair hearing, and their sufficiency has been upheld in other proceedings conducted under provisions that do not trigger the APA. *Trailways, Inc.* v. *ICC*, 681 F.2d 252, 253-254 (5th Cir. 1982); *Crete Carrier Corp.* v. *United States*, 577 F.2d 49, 50 (8th Cir. 1978). Cf. *United States* v. *Florida East Coast R.R.*, 410 U.S. 224 (1973).

Michigan's petition does not identify any specific respect in which the State was prejudiced by the absence of an oral hearing. It also failed to state with specificity why such a hearing was necessary in its reply statement filed with the ICC, as required by the relevant Commission rule. 49 C.F.R. 1112.10.[10] Fi-

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[10] That regulation states:

> Requests for oral hearings in matters originally assigned for handling under modified procedure should be included in the reply or rebuttal statement. The reasons why the matter cannot be properly resolved under modified procedure must be set out in full. Requests for cross examination of witnesses must include the name of the

nally, the record forecloses any claim that the absence of an oral hearing denied Michigan an opportunity to establish its claim. In its written submissions, Michigan was able to confront the facts on which Hover relied to establish the legitimacy of its operation. Hover's principal was subjected to cross-examination in a prior state proceeding, and the record of that proceeding was before the Commission here. 90-966 Pet. 19. Indeed, the intervenor-petitioners emphasize—referring to various sources of information before the ICC in this case—that "[t]his record is complete." *Ibid.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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witness and the subject matter of the desired cross examination.

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Nos. 90-926, 90-966

In The

Supreme Court of the United States

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and PARKER MOTOR FREIGHT, INC.,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,

Respondents,

and

HOVER TRUCKING COMPANY OF MICHIGAN,

Respondent-Intervenor.

Petition For Writ Of Certiorari
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For The Sixth Circuit

PETITIONERS' RESPONSE TO BRIEF OF RESPONDENTS HOVER TRUCKING COMPANY AND FEDERAL RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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ARGUMENT

A. The ICC Did Ignore the Bad Faith Factor in Order to Expand its Jurisdiction, and Eliminate State Regulation of Intrastate Transportation.

The Federal Respondents do not dispute the proposition, advanced by Intervenors, that the ICC has publicly proclaimed to Congress that continued state economic regulation of for-hire truck transportation is counterproductive, and totally at odds with the preferable "Brave New World" of unfettered competition which the ICC has overseen during the 1980's in this industry. This agency has proudly announced to Congress that it has done all that it can, to contract state regulation, and urged the legislature to take the ultimate step – preempt intrastate regulation. As Congress has refused to take this step, the agency has been left to creative expansion of its jurisdiction vis-a-vis the states, to fulfill the ICC's own deregulation agenda. That is what has occurred in the *Hover* case, no matter what gloss the Federal Respondents seek to place upon it.

This can best be seen in the strained analysis presented by Respondents on the bad faith issue. Again and again, bad faith evidence, or the lack thereof, was pointed to as the critical factor, by both the ICC itself and the reviewing courts. Yet, in this case, the ICC stated that "bad faith" was no longer important, as long as the criteria established in *Pennsylvania Public Utilities Commission v. Arrow Carrier Corporation*, 113 MCC 213 (1971), aff'd *per curiam* 415 U.S. 902 (1974), are met. There is no case which supports this proposition, including those very cases brazenly cited by the Federal Respondents in their Brief in Opposition.

The case of *Rock Island Motor Transit Company v. Watson-Wilson Transportation System*, 99 MCC 303 (1965), aff'd *sub. nom. Rock Island Motor Transit Co. v. United States*, 256 F.Supp. 812 (S.D. Iowa, 1966), heavily relied upon by

Respondents, is most instructive on this issue. In *Rock Island*, the ICC stated, at 99 MCC 316, that:

> Nor does *any* other evidence point to subterfuge. Indeed, it points the other way. As nearly as we can tell from this record, the operation was begun innocently more than a generation ago, with no subterfuge intended on (Respondent's) part and none feared by petitioners or intervenor. (Emphasis supplied).

This Hover operation was not begun a generation ago. It was begun in 1983, when Hover was not "a far-larger single-line carrier operating in six states" (Federal Respondents' Brief, 12)[1]. Hover never established that it had these operations when it moved about ten miles from Niles, Michigan to South Bend, Indiana. Further, with regard to the ICC's conclusion that South Bend was a logical choice, given the six-state area (Federal Respondents' Brief, 12), that area had nowhere near the level of Hover service in 1983, when its decision was made. Further, it moved about ten miles. Niles, Michigan is just as logical as South Bend, Indiana, even assuming a six-state area of operations. The move was made by Hover to avoid Michigan regulation. Hover's Michigan activity remains the important financial center of its operations. Bad faith was an issue in *Rock Island*. There was no evidence of bad faith presented there. On the other hand, the instant record is rife with evidence of bad faith.

On review, in *Rock Island, supra*, the three-judge district court differentiated the facts before it with other proceedings where a subterfuge had been established, by noting that bad faith present in the other proceedings was

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[1] Hover cannot be described as a single-line carrier in any event. Much of its traffic is handled on an interline basis with other carriers, and even picked up and delivered on its own line by agents possessing their own ICC authority.

not present in the facts before the ICC[2]. The Iowa-to-Iowa shipments in *Rock Island*, further, were only a minute fraction (less than 1%) of the traffic handled by the involved carrier from the questioned Iowa points, including both intrastate and interstate traffic[3]. The same is not true here.

In *Missouri Public Service Commission v. Missouri Arkansas Transportation Company*, 103 MCC 641 (1967), again cited in Federal Respondents' Brief at 12, the ICC again relied heavily on the absence of direct evidence of bad faith. As was there stated, at 103 MCC 646.

> If defendant's actual routing and method of handling the considered traffic originating at or destined to a point in Missouri through Kansas, although for its convenience, appears operationally reasonable, *and absent evidence from which we can independently infer bad faith on defendant's part*, we have no alternative but to decide this question in its favor. (Emphasis supplied).

The ICC emphasized that "*no facts*" had been established from which bad faith could be inferred. See 103 MCC at 647 (Emphasis supplied).

Other cases cited by the Federal Respondents held similarly. In *Jones Motor Co. v. United States*, 218 F.Supp. 133 (E.D. Pa. 1963) petition for reh. den., 223 F.Supp. 835, aff'd *sub. nom., Highway Express Lines v. Jones Motor Co.*, 377 U.S. 217, 84 S.Ct. 1244, 12 L.Ed.2d 292 (1964), the three-judge district court noted initially at 218 F.Supp. 137 that:

> *no direct evidence of bad faith* was offered by the P.U.C. (Emphasis supplied).

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[2] 256 F.Supp. at 817.

[3] 256 F.Supp. at 816, n.5.

The lack of evidence of bad faith, in denying the rehearing, was again underscored[4]. In still another case, *Tri-D Truck Lines, Inc. v. ICC*, 303 F.Supp. 631 (D. Kan, 1969), the three-judge district court analyzed the evidence in detail, in order to conclude that there was no bad faith on behalf of the respondent carrier.

The Federal Respondents continue to ignore all of this language, as well as the emphasis of bad faith in those several cases which found that a carrier had abused its ICC certificate[5]. All of this language is ignored by Federal Respondents. It is overlooked, precisely because the decision below cannot be squared in any respect with these past cases, including, most importantly this Court's decision in *Service Storage & Transport Co., Inc. v. Virginia*, 359 U.S. 171, 175, 79 S.Ct. 714, 3 L.Ed.2d 717 (1959), wherein it was written by Justice Clark, for a unanimous Court, in commenting on the Commonwealth of Virginia's case,

> However, it offered *no direct evidence of bad faith* on the part of petitioner in moving its traffic through Bluefield, West Virginia. (Emphasis supplied).

Yet, the ICC, in the *Hover* case, considered none of the bad faith evidence as outlined by Intervenors in their Petition, other than the statement by Hover's President to a newspaper reporter that, through moving its facilities to

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[4] 223 F.Supp. at 236.

[5] *Service Trucking Company, Inc. Petition for Declaratory Order*, 94 MCC 222, 225-226 (1963), aff'd *sub. nom., Service Trucking Co. v. United States*, 239 F.Supp. 519 (D.Md., 1965), aff'd 382 U.S. 43, 86 S.Ct. 183, 15 L.Ed.2d 36 (1965); *Pennsylvania Public Utility Commission v. Leonard Express*, 107 MCC 451, 459-463 (1968), aff'd *sub. nom., Leonard Express, Inc. v. United States*, 298 F.Supp. 556 (W.D.Pa., 1969); and *Haley, Public Utility Commissioner of Oregon v. City Transfer & Storage Co.*, 112 MCC 80, 92-94 (1970).

South Bend from Niles in 1983, Hover could serve the State of Michigan without holding authority from the MPSC (Intervenors' Appendix, 14a). Even that motivational statement was cavalierly dismissed by the ICC, with the comment that:

> In any event, motivation is not relevant here because the criteria set forth in *Arrow, supra,* have been met.

(Intervenors' Appendix 25a-26a). The ICC's rejection of bad faith, as a factor, when the *Arrow* test has been fulfilled cannot be reconciled in any respect with the earlier statement by this Court in *Service Storage* as well as other federal court and ICC pronouncements on the analysis of these issues.

This ruling in *Hover,* was more than a throw-away line, or, as Federal Respondents assert here, "an alternative ground." Federal Respondents' Brief, 15. It is telling of the ICC's jurisdictionally expansionist analysis of all of the evidence here – if the evidence detracted from a finding that the Hover traffic was interstate in nature, it was not considered.

For example, the ICC did not consider the fact that Hover transported this traffic directly between Michigan points in normal routine operations without involving South Bend, until it was apprehended. Only after being caught was this practice discontinued. This establishes bad faith, just as the submission of a false affidavit by Hover's President to the MPSC in the state complaint proceeding establishes bad faith. He indicated in that affidavit that all traffic was moving through South Bend, when Hover later admitted that such traffic was not moving through South Bend on a "normal, routine" basis. The ICC did not consider these critical factors, unnecessary in its view, because the *Arrow* factors had been met. This is a tortured application of past precedent.

The handling of this Michigan traffic directly by Hover is vitally important. It was more than "some" traffic. Federal Respondents' Brief, 14, n.8. Also, Hover

established procedures to prevent this, only as part of the resolution of a complaint proceeding brought against it by the MPSC. Moreover, Hover has manipulated these procedures, so that it can serve Michigan points only 23 miles distant (Detroit and Pontiac, a northern Detroit suburb) through South Bend when Hover's Pontiac and Detroit terminals have peddle runs longer than 23 miles themselves. The ICC gave the bad faith evidence no significance, because it had ruled the bad faith factor out of existence. This was not justified under *Service Storage* or any other past precedent. It was this flawed analysis by the ICC that lead Judge Welford to comment, in dissent below that:

> I am at a loss to understand this part of the ICC's conclusions in this controversy. Evidence of bad faith is, indeed, highly relevant to any ultimate determination of subterfuge to circumvent legitimate state regulation.

(Intervenors' Petition, 15a). Even the majority below was "given pause" by the ICC's treatment of bad faith. (Intervenors' Petition, 8a). Contrary to the majority's conclusion, however, the ICC did not consider all of the bad faith evidence, as the ICC commented only on the admission to the newspaper reporter, and not on the myriad of other facts establishing bad faith (Intervenors' Petition, 17-19). The decision of the ICC was crafted with one end in mind – to establish ICC jurisdiction over the Hover traffic. It should not be allowed to trample upon the facts and the law, to interfere with what is still a legitimate state function, the economic regulation of intrastate truck transportation.

B. The Arrow Analysis by the ICC Below was also Novel, and Designed to Approve Virtually any Less-Than-Truckload Operation Conducted Under an ICC Certificate Through a Point in Another State.

The Federal Respondents contend that the ICC properly analyzed the facts of this case, in line with *Arrow, supra.* (Federal Respondents' Brief, 13, 15-16). What the ICC did, however, was once again shove the Hover facts into an *Arrow* vessel in which they do not fit.

On the issue, for example, of operational justification, the ICC did not take into account the past Hover direct routings which avoided South Bend. The ICC never addressed the question of why Hover moved LTL traffic directly between its Michigan terminals on a "normal, routine" basis. The question was avoided, because the answer is necessarily at odds with the ICC's ultimate conclusion below. The answer is that Hover made the clear judgment in the past that the routing of such traffic through South Bend was unnecessary, and not reasonable, logical and normal. It made sense, from an operational and economic standpoint, to leave this traffic on a normal, routine basis in Michigan, and route line-hauls directly between the Hover Michigan terminals, all capable of processing LTL traffic. Instructions were given to Hover personnel in Michigan to route traffic directly on a normal, routine basis. This admission by Hover that the South Bend routing was illogical was not considered by the ICC. Neither was other evidence considered, such as alternative, available methods of tying the Hover Michigan facilities together with simple line-haul routings which would take advantage of load factors on Michigan traffic; or the economic analysis of Intervenors' expert Mr. Glenn Fast that Hover's routings through South Bend were costly and inefficient. The ICC was not distracted by the facts from its ultimate goal of finding that the Hover handling of Michigan-to-Michigan freight was interstate in nature.

Along these very lines, it was necessary for the ICC to concoct a new circuity test, and consider traffic not at issue in this case, so that the circuity factor could be reduced to a level that the ICC could brush aside as inconsequential. Unlike *Gray Line Tour Co. v. ICC*, 824 F.2d 811 (9th Cir., 1987), cited by Federal Respondents, these packages receive no aesthetic benefit from visiting a freight dock in South Bend, Indiana. These shipments could be handled similarly on a direct basis at Hover's extensive (and ever-growing) network of terminal facilities in Michigan, as such shipments were handled directly by Hover in the past on a normal, routine basis. A new circuity method of analysis had to be devised by the ICC in this case, because never before had it considered a scheme of the magnitude confronted in this case, involving as it does Hover service on Michigan-to-Michigan traffic for the entire lower peninsula.

Recognizing also that it was considering non-issue traffic to reduce the circuity numbers, the ICC felt constrained to say that circuity was not important anyway, when analyzing LTL freight operations. Neither *Rock Island* nor any other past case supports this proposition. For the ICC, as an administrative agency, to depart from past tests, it must articulate clearly its reasons for that departure, as opposed to merely ignoring the plain language of its past decisions and those of the courts, as it has done in this case.

Circuity is a major factor in analyzing LTL operations, as well as in other cases. As the ICC itself stated in *Arrow, supra*, at 113 MCC 220, "No single factor is controlling. Nor is there any presumption in favor or against any one". *Arrow* involved an analysis of LTL freight. The ICC changed the rules below, not only on bad faith, but on circuity. It did so, to expand its jurisdiction, vis-a-vis the states. This is an unjustified course of action, unauthorized by any legal theory.

CONCLUSION

The issue in *Hover* before the ICC was not whether its regulatory policies were more intelligent than those of the State of Michigan. The issue was whether the respondent carrier had unlawfully used its ICC certificate as a subterfuge in providing a service on traffic having both a Michigan origin and Michigan destination. Further, the ICC should have analyzed the facts below in accordance with past precedent of this Court, other federal courts, and the Commission itself. It did not do so. That the ICC is convinced of the wisdom of its de-regulatory policies is made clear, by cases such as *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. 2759, 111 L.Ed.2d 94, 58 U.S.L.W. 4862 (1990). That does not mean that the regulatory course chosen by the ICC is legally justified, however, as this Court noted in *Maislin*. It is up to Congress, and not the ICC, to expand ICC jurisdiction over intrastate transportation if that is to come. The ICC must not be allowed to expand its jurisdiction in the fashion which it has here. Petitioners pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

Date: February 25, 1991

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